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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 238.

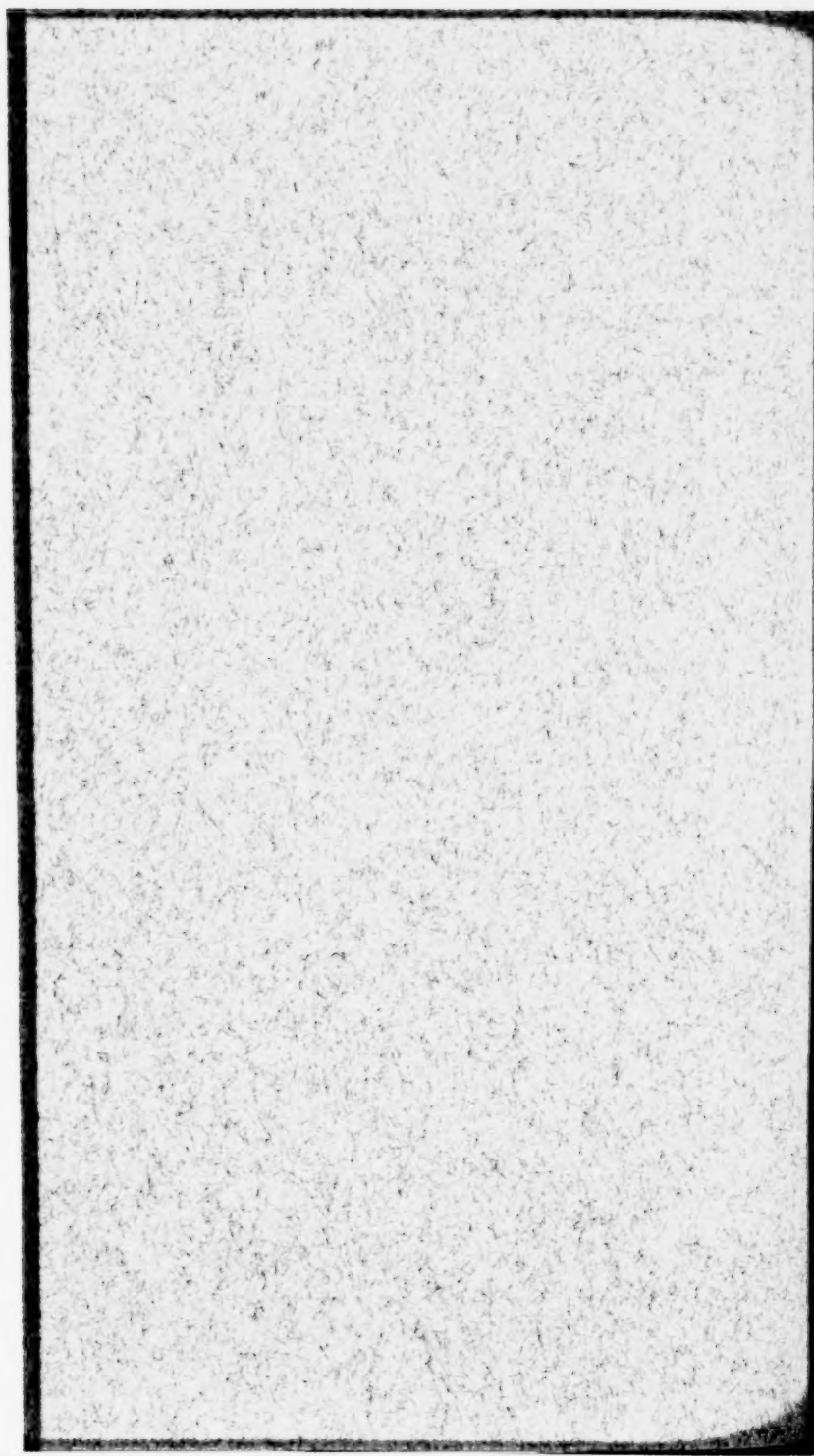
BENJAMIN I. SALINGER, JR., PLAINTIFF IN ERROR.

vs.

**THE UNITED STATES OF AMERICA,
DEFENDANT IN ERROR.**

**SUPPLEMENTAL BRIEF AND ARGUMENT FOR
PLAINTIFF IN ERROR.**

**B. I. SALINGER,
ROBERT HEALY,
ARTHUR F. MULLEN,**
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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

No. 238.

BENJAMIN I. SALINGER, JR., PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA,
DEFENDANT IN ERROR.

**SUPPLEMENTAL BRIEF AND ARGUMENT FOR
PLAINTIFF IN ERROR.**

I.

Reasons for Entertaining Jurisdiction

The opposing brief (2) states the Government is not urging lack of substantial Federal questions. But it says, also, that whether such questions are presented is for the court, upon argument. We therefore submit:

As jurisdiction depends on the state of the law before the Act of February 13, 1925, became effective * * * jurisdiction should be entertained because the construction and application of the Constitution is involved.

Section 238, Judicial Code; *Horn v. Mitchell*, 243 U. S., 247; *Spreckles v. McClain*, 192 U. S., 397; *Pothier v. Rodman*, 261 U. S., 307; *Pierce v. U. S.*, 252 U. S., 239; *Moy v. U. S.*, 254 U. S., 189; 34 Statutes at Large, 1246; *U. S. v. Celestine*, 215 U. S., 278; *U. S. v. Nixon*, 235 U. S., 231.

The foregoing are applicable and controlling (even if it be finally decided that the Federal questions were decided rightly, below — *Sugarman v. U. S.*, 249 U. S., 182) — because:

(a) There was much testimony which was, and was objected to for being, hearsay (pp. *post*), and this involves an application of the Constitution, because receiving hearsay works a denial of the constitutional right of confrontation. *Delaney v. U. S.*, 263 U. S., at 590, citing *Rowland v. Boyle*, 244 U. S., 107, 108; *Spiller v. Railway*, 253 U. S., 117, 130; *Diaz v. U. S.*, 223 U. S., 442, 450. See subject hearsay, *post*.

(b) There is presented an application and construction of the Constitution in the contention that the indictment was in such form as not to apprise of the accusation made. See *Stewart v. U. S. (C. C. A.)*, 119 Fed., at 89, and pp. 23 to 28, *post*.

(c) The contention that the court amended the indictment involves the application and construction of the Fifth Amendment. (See original argument page w and pp. 1 to 10; and *post* 33, *et seq.*)

Any method of amending an indictment presents a constitutional question. *U. S. v. Howard* (C. C. A.), 132 Fed. at 344; *Dembowski v. U. S.* (C. C. A.), 252 Fed. at 802.

(d) Without going into the question which case should rule, there is at this writing a conflict between *Salinger v. Loisel*, 265 U. S., 224, and *Stever v. U. S.*, 222 U. S., 145.

(e) The *Loisel* decision involved nothing but challenge of right to remove, presented on appeal in *habeas corpus*, and, therefore, could not and does not settle that the matters now presented do not constitute substantial Federal questions. On most diligent search, we have been unable to find a single decision on writ of error, or indeed, on any form of review which holds that where the only warrant for trial, say in the District of South Dakota, is the placing of a letter in the mail, say in Iowa, the jurisdiction lies in South Dakota, and we submit that, therefore, this writ should be entertained.

(f) Many matters are now involved and presented which were not, and could not be, presented in the *Loisel* case, *e. g.*—whether the evidence supports the jurisdiction allegation.

II.

That the Loisel decision can and should be held not to foreclose this writ of error is not refuted by naked assertion that it should.

No general assertion can change the record of the Loisel decision. It was a resistance to removal presented here on appeal from refusal to stop removal by *habeas corpus*. The review was controlled by the rule that *habeas corpus* cannot be turned into a writ of error. It follows that the Loisel decision settles nothing that may not be presented on *habeas corpus*. It *could* settle whether the indictment authorized trial in South Dakota. But it was not asked to. This, because the indictment (all that was before the court) *did* have an allegation asserting jurisdiction for South Dakota (R., 5). Therefore, the complaint of appellant was necessarily no more than that the allegation was insufficient because a mere conclusion, and that question could not be resolved by this Court on that review. Of course, the decision settled nothing which under well-settled rules is, in the first instance, for the trial court. (See pp. 41, 42, original argument.) Equally, of course, those very things may be reviewed on writ of error. Some things that might have been decided were not passed on because it was needless. For example, the condition of count seven (7) as to failure to allege postage was immaterial because the first five counts did have a detailed description of postage affixed. And if any count warranted removal, it became immaterial that other counts did not. *Yennie v. U. S.*,

74 Fed., 222. And, obviously, the Loisel decision did not settle anything that did not exist when the decision was made. For example, the question whether the venue alleged was proved, or whether the evidence was fatally variant. Counsel does point out the decision found defendant made "protracted efforts to avoid removal." He does not indicate its relevancy. (2) What it did settle nowhere goes beyond refusal to treat the narrow appeal before the court as a writ of error. This is made plain by the concluding statement:

"We conclude that there is no sound basis for the claim that the indictment shows that the offense was not committed in the district to which removal is sought."

This followed decisions such as *Brown v. Elliott*, a *habeas corpus* case dealing with resistance to removal. Surely, it would never have been said on writ of error. On that the question is not whether the indictment *shows affirmatively that jurisdiction is lacking*, for, on writ of error, it would be fatal that *existence* of jurisdiction *was not affirmatively made to appear*.

III.

And nothing said in the brief of the Government meets our contention that, at all events, the Loisel decision should not stand as written—because:

1. The court of last resort needs no supporting decisions, and should be the last to cite nothing more than three irrelevant ones. The first, *Horner v. U. S.*,

132 U. S., 207, 213, turns on a special provision authorizing trial where a letter violative of the lottery statute is mailed, carried or delivered. Section 215 has no such provision, and Congress has steadfastly refused to put one into any misuse of the mails statute other than the lottery one, and such "borrowing" is not permissible. *Stever v. U. S.*, 222 U. S., 167. *U. S. v. Sauer*, 88 Fed., 250. *State v. Summers (Tex.)*, 44 S. W., 797.

2. The other two are not mail cases at all. One (*In re Palliser*, 136 U. S., 257) is an attempt to bribe a postmaster. It is thus limited in reason and by Judge Goff in *Conrad v. U. S.*, 59 Fed., 464, in part, on what he quotes from the *Palliser* decision. The other is *Burton v. U. S.*, 202 U. S., 344, 386—an offer to do prohibited department work.

As said, neither is a prosecution for misuse of the mail. Such misuse is purely adventitious and no element of the Federal offense. The offense would have been as complete if *Palliser* had attempted to bribe or *Burton* offered to work, by word of mouth or by a letter delivered in person or sent by express. Both are merely offenses begun in one district and completed, if at all, in another district—but mailing is completed where mailing is done.

The point is fortified and clarified by the decisions in which it is held that, unlike forgery, the venue for uttering lies where the forgery is uttered (published), even if the forgery is mailed where no uttering is done. See *State v. Swank (Ore.)*, 195 Pac., 168; *Lindsay v. State*, 38 Ohio State, 507; *State v. Hudson*, 13 Mont., 112; *Jessup v. State (Tex.)*, 68 S. W., 988.

3. The decision disregards holdings that unlawful deposit is still a completed offense; disregards decisions that such deposit is not a continuous offense—*In re Henry*, 123 U. S., 372; *Badders v. U. S.*, 240 U. S., 394; *De Bara v. U. S.*, 179 U. S., 316—and in the case of *Whitehead v. U. S. (C. C. A.)*, 245 Fed., 670, it is held that the offense is so fully completed at the point of mailing that subsequent delivery is immaterial—and this, of course, was ruled when the last amendment to R. S. 5480 was in force.

4. It disregards that "causing" must be done somewhere, and that venue lies there only, even if the first injury done by the causing occurs elsewhere.

5. It makes the act of unlawful deposit a crime by that name and into a second crime named "knowingly cause delivery."

6. It disregards all the legislative and the judicial interpretation.

7. It holds that because Congress made a new offense causing delivery—and so has made the older prohibition more effective—the constitutional provision as to place of trial has no application.

8. It overlooks that if Section 215 Penal Code means that one who does nothing but mail a letter in Iowa may be prosecuted in South Dakota, that statute is unconstitutional.

9. It disregards *stare decisis*.

10. The decision misunderstands what appellant presented, no doubt due to faulty presentation. The court was moved to say:

“Appellant insists that the introduction of the new clause is not of material significance here,”

and that the court is of different opinion for reasons given. We submit that, so far from desiring to make such a contention, the defendant used it as an argument that the change *was* of very great “material significance.” What he wished to urge and thought he had urged was that the change was so much a matter of substance, had been so frequently held to broaden and better the original, as that it should not be deemed to have created a change in *venue regulations*, which, instead of being matter of substance, are *pure matter of procedure*.

And there are other reasons why the points now being presented (which can by any strain be deemed to have been involved in the Loisel decision) did not receive the fullest of consideration. This was due, for one thing, to the emphasis appellant gave to one question which is no longer in the case, to wit: How “prosecution,” as used in Section 53 of the Judicial Code, should be interpreted, and to presenting that on what he contended was the correct interpretation the indictment was void because, though it charged offending in the southern division of the district of South Dakota, it was returned in the western division.

3—a.

Some amplification is proper.

The Loisel decision makes two offenses out of a single act.

Inferentially it has been held frequently that the deposit is the causing of delivery. For example, that depositing a letter, duly stamped and addressed, in the post office *is a deposit for mailing and delivery*, i. e., causing delivery. This is affirmed by the following Circuit Court of Appeals decisions: *Olsen v. U. S.*, 287 Fed., 89; *Rimmerman v. U. S.*, 186 Fed., 302; and *Hume v. U. S.*, 118 Fed., 689.

In *U. S. v. Stokes*, 157 U. S., 187, 15 Sup. Ct., 619, last column, near bottom, it is said:

“The deposit of a letter, duly stamped and addressed, discloses the intent that the establishment shall deliver the letter to the addressee.”

It has been held, expressly: In *U. S. v. Moffatt* (C. C. A.), 232 Fed., at 532, 533, wherein the letter was mailed in Chicago; and was delivered at St. Louis. And the court said:

“The delivery in St. Louis in substantial compliance with the defendant’s intent and purpose, ‘to wit, that the letter mailed in Chicago should be delivered at St. Louis’ makes the court ‘of the opinion that this evidence was sufficient to justify the jury in finding that the defendant caused this letter to be delivered by mail according to the directions.’ ”

That, here, the mailing constituted the "causing" is demonstrable by argument not yet made. An effective indictment must present fact allegations. This indictment has, on this head, but one—the deposit in Sioux City. At any rate the "causing" used in the statute is a verb—*Kenofskey v. U. S.*, 243 U. S., 440, 443. It means "to bring about"—*Century Digest*. Obviously, this bringing about must be accomplished by some act done somewhere. When we look for an *act*, we find nothing but deposit in Sioux City. The *Kenofskey* decision rules that the use of "cause" as a verb means some action which, in reason, could be thought to attain the desired object. Was not the mailing in Sioux City an act that was done to attain such object? Speaking to whether a charge of knowingly causing deposit was sustained, it was held in *De Molli v. U. S. (C. C. A.)*, 144 Fed., 363 (approved in the *Kenofskey* case) that such causing was worked by an act which

"set in operation and made use of an agency which, as he knew at the time, would, according to the established and regular course, carry the objectionable matter through the mail to the person to whose attention he designed it should be brought," and that one is responsible if he do an act, "intentionally done by him, with knowledge, at the time, that such will be its natural and probable effect."

It is said in *Bone v. U. S.*, 95 U. S., 130:

"The efficient cause is the one that necessarily sets the other causes in operation."

In *Morse v. U. S.*, 287 Fed., 912:

“Mailing, duly stamped, is the act which brings about ‘that the machinery of the United States Post Office Department would be legally set in motion.’”

Suppose one deposited a stamped letter, without address. That would not be a use of the mail, and therefore no misuse of it—*Brazee v. U. S.*, 78 Fed., 464, 465. Why is that not as true where the letter is addressed, but not stamped? Which means that the offending is done where depositing of a stamped letter is done. If that be not so, why the numerous decisions that a presumption of duty done, to cause delivery and delivery arises only when there is deposit with address and stamp?

3—b.

That is the legislative interpretation.

The lottery statute has the very words of the statute at bar, to wit, “knowingly cause to be delivered.” Congress did not intend that this gave alternative venue, because it added an express provision giving such venue. So of the Mann Act. And the words used in one statute are presumed to be used in the same sense when used in another statute—36 Cyc., 1154. (And see page 28, original brief.)

Section 3989, 8 Fed. Stat. Ann. 1914, provides:

“All mail matter deposited for mailing on which one full rate of postage has been paid as required by law shall be forwarded to its desti-

nation, charged with any portion of the proper postage which may be unpaid, to be collected on delivery."

This would seem to be a flat statute declaration that deposit with the stamping required by this statute constitutes causing delivery, because it is a provision that such stamping makes it the duty of the establishment to "forward to its destination," which, of course does not mean the town of address but the hands of the addressee.

The report that recommended the passage of said postage-rate provision also recommended the amendment at bar which added to the statute "or shall knowingly cause to be delivered"; and the report recommended the passage of the lottery statute with the words just quoted in it, plus a specific alternative venue provision. All three recommendations were enacted into law. Can it be said that Congress provided in the lottery statute alternative venue, in addition to prohibiting the knowingly causing of delivery, and thus made plain that it thought the express provision was necessary, and that it also enacted that payment of postage should carry to destination, and still intended that putting on the postage should not work a causing of delivery, and intended that notwithstanding the omission of the express alternative venue provision in Section 215, as amended, it should be understood to be exactly what it would be if said express provision had been put into it?

Every time Congress touched the word "causing" it made it plain that it did not thereby intend to affect

place of trial. For, it always added an express provision giving elective venue. No reason is apparent why in the statute at bar Congress evinced an intent to provide such venue by a prohibition of causing delivery. As said, in *Chapman v. U. S.*, 164 U. S., 436:

"The courts will not conclude that Congress, 'which might easily have conferred jurisdiction in plain and explicit language, resorted to contrivance to perfect it.' "

"An undeviating course of legislation in a certain direction, continued for a long time, and being an effort to perfect the law relating to a certain subject, strongly emphasizes the expression found in the final declaration of the legislative will. *Wellsburg v. Traction Co.* (W. Va.), 48 S. E., 748."

"The refusal of the legislative body to insert a provision according to a report recommending it, is most persuasive against construing the act passed to include that provision. 25 R. C. L. (Stat.) 271. *Weaver v. Davidson* (Tenn.), 49 S. W., 1105; *Calhoun v. Little* (Ga.), 32 S. E. 86."

Until the decision in the *Loisel* case, there seems to have been but one prosecution brought in the place of delivery. That was in *Moffatt v. U. S.*, 232 Fed., 522, and in that the jurisdictional question was not mooted. And it is shown by an investigation, which begins with when said amendment became effective and ends with the advance sheet pamphlet of November 1, 1923, there was prosecution at the point of mailing in 42 cases. In 33 this appears to be so by unescapable implication;

and in none of them is this amendment to Section 215 so much as mentioned.

3—c.

Was there intention to make two offenses out of an identical act?

Did Congress intend to make (assuming it might do so) one offense of unlawfully depositing a letter for mailing and another of a causing of delivery which was thus caused? If it did, and there were trial for one of these offenses, could not the judgment therein be pleaded in bar on an attempt to prosecute for the other? The Loisel decision says there might be an election to prosecute in Sioux City. Suppose it had been exercised, and there had been a trial, merely on the charge that the letter had been put in the post office there in violation of the statute. Could defendant be again tried for having caused the delivery of that same letter and by means of that identical act of mailing?

How does all this differ from what this Court has held: In Nielsen's case, 131 U. S., 176, 9 Sup. Ct. at 676, 677, and *Ex parte Lange*, 85 U. S. at 171, there is approved a New Jersey decision (Cooper, 1 Green, 361), that one who had been convicted for arson cannot be punished under a later indictment for the murder of one who came to his death from burning in the fire. The Nielsen case rules also that one who is charged with murder committed in the perpetration of a burglary, if acquitted on that, cannot afterwards be convicted of a burglary with violence, in aid of which said murder was done.

3—d.

Was that the intent because injury from mailing might first become effective or injurious in a place where no mailing was done?

We beg first to recall the Whitehead decision that the offense, under the statute as amended, is complete if the letter be never delivered.

Take the Mann Act. Suppose that had no express provision for elective venue. If the ticket for the woman's transportation were bought in Iowa and she was placed on the train there, could there be prosecution in Illinois because she left the train there?

“The trial must take place ‘where the manifest act of the defendant was done—where his act of agency was employed.’ ”

“And the Constitution ‘forbids trial in a district where the ultimate consequences of his act happened, but where he does not act.’ ” Guiteau's case (Mackay) 544, *et seq.*; *Dana v. U. S.*, 68 Fed., 888; *Smith v. U. S.*, 173 Fed., 227; Cooley Const. Lim., page 320, note.

In *Fowkes v. U. S.* (C. C. A.), 53 Fed., 13, where a voucher was signed in one state which resulted in the payment of a rebate in another, the jurisdiction was held to lie where the voucher was signed instead of the place where its signing brought about the result intended.

And we complain of the instruction on this head. The charge is:

“Then it is charged that the defendants did cause letters set out in the indictment to be deposited in the regular mailing facilities of the post office establishment and it caused them to be delivered over here in South Dakota at towns specified in the indictment.

“And that those letters were so caused to be delivered over here in South Dakota as a part of the purpose and intent to carry out and effectuate the device and scheme and plan to defraud charged in the indictment.

“The gist is a scheme thereafter to be carried out ‘by causing a letter to be delivered through the post office establishment here in your State of South Dakota’ ” (439).

It is obvious that saying the gist is the causing delivery by the establishment, “here in South Dakota,” did not comply with the request that it be charged it was necessary to prove that the causing was done in South Dakota. (And see grounds 11 and 12, motion for bill of particulars, R., 47.)

And there was the following exception:

“I ask the jury to be charged clearly that the causing of letters to be delivered must be by some act done by the defendant within the Southern Division of the District of South Dakota.”

3—e

The Court erred in its treatment of the Stever decision 222 U. S., 167, in the Loisel decision.

In the Stever case defendant mailed a letter in Iowa, addressed and delivered to a person residing in Ken-

tucky—and it is held prosecution could not be had in Kentucky. That would have controlled the Salinger-Loisel appeal were it not for the asserted distinction that the statute has been changed. But surely the Stever decision on venue is not affected merely because of *any* statute change. The inevitable implication of the Loisel decision is that adding a prohibition of causing delivery is more than *any* change—does affect what is ruled on jurisdiction in the Stever decision. We submit that the change was not intended to affect venue, and, obviously, had a different purpose, to wit, reaching those who under the original statute were immune because no matter how much they aided a fraudulent scheme, they had not participated in its devising.

The Loisel decision rightly says that despite amendment the original statute was retained. That statute has for its beginning a statement that it deals with those who had devised a scheme to defraud. Before amendment, no one could be prosecuted no matter what he did to help the scheme, if he had not been a party to devising it. In *Foster v. U. S. (C. C. A.)*, 178 Fed. at 170, involving a charge of the misuse of the mails in aid of a scheme to defraud the court held:

“One cannot be indicted under the statute in question by using the mails in furtherance of a scheme to defraud not devised or participated in by him.”

In *Stewart v. U. S. (C. C. A.)*, 119 Fed., 94:

“The deposit of this letter in the mails by Cooke at Bronson, Kansas, did not constitute an offense, because Cooke was not a party to the alleged scheme or artifice to defraud.”

And the same was held over and again by inescapable implication. For example—it is said in *Ewing v. U. S.*, 136 Fed., at 54, that according to *Stokes v. U. S.*, 157 U. S., 187, one of the three matters that must be charged and established is, “that the person charged had devised the scheme or artifice to defraud.” Not only is it, therefore, plain that the purpose of the amendment was not to affect the place of trial but to reach a new class, but that is also its judicial interpretation. It is said in *Charles v. U. S. (C. C. A.)*, 213 Fed., 710, approved and quoted in *Bettman v. U. S. (C. C. A.)*, 224 Fed., 825, that the intent of the amendment was:

“To reach any and all classes of individuals who may form the intention of using the mails for fraudulent purposes, including those who might carry out a plan to defraud by invoking the aid of those who were not parties to the original scheme.”

* * * * *

Again—no amendment should be construed to condemn an offense covered by the original statute.—*Telegraph Company v. Bierhaus (Ind. App.)*, 36 N. E., 161. The amendment uses the word “knowingly.” Now, *knowingly* causing delivery, was, of course, punishable under the original statute. One who devised a scheme to defraud and mailed a letter in aid of it, necessarily “knowingly” caused delivery. The only way, then, to save the amendment from being held to be a mere repe-

tion of the original is to hold that it seeks to reach a class that might act either knowingly or innocently.

* * * * *

We submit that what is further said in the Loisel decision on this head does not support a contention that this amendment was a *venue* amendment. Suppose the amendment did create a new and independent offense. Congress does that frequently. Is not the constitutional provision as to place of trial always present to attach to the new offense? Suppose the amendment is a broadening, bettering and enlarging of the original. How does that dispense with said constitutional provision? (See pp. 31, 32, Original Argument.)

* * * * *

There is but one possible avoidance of the Stever decision—to hold that it is a mere *dictum*. Is that warranted? True, the amendment on which the Loisel decision turns was not effective at the time the Stever indictment was returned. But it was in existence then, and the argument of counsel dealt with the effect of that amendment. It will be found on examination of the record in the Stever case that full argument was had on the effect of those words, and that the Government even contended that they made no change in the original statute; that in effect that statute did prohibit the unlawful causing of delivery and that because of that prohibition Kentucky had jurisdiction. At any rate, both sides fully argued the question and the decision actually turns upon nothing but the holding that

despite those words Kentucky had no jurisdiction. This cannot be a *dictum*. A *dictum* "is a judicial impertinence." The objection to it is that it passes on points upon which no argument was submitted and to which, therefore, no serious consideration was given. That, surely, cannot be said as to what occurred in the Stever case. And even if said amendment was not effective as to Stever, the court had the right to pass upon its meaning and effect under the rule that it is never *dictum* to construe statutes in *pari materia*. 36 Cyc., pp. 1134, 1136; Mitchell's case, 98 Va., 459; Crawfordville's case, 104 Ind., 97; Gilbert's case, 67 Kan., 346—and see 25 R. C. L. (Statutes), 285. Nor is that all. Without reference to the rule just quoted any decision upon full argument as to what the meaning of certain words is, decides bindingly what that meaning is, where, in the same court the same words come up for construction. That is to say, if this Court ruled in the Stever case what effect the words "knowingly cause to be delivered" had on jurisdiction and venue, the interpretation there made will, ordinarily at least, be followed in this Court in any case wherein the interpretation of the same words is presented—at least, will be followed unless a better reason can be found than said change in statute.

3—f.

There are but four acts for which it *can* be claimed that, here, delivery was caused:

- a. That there was delivery in South Dakota.

b. That as to a letter deposited in Sioux City, defendant did something in South Dakota to aid, hasten or insure delivery.

c. That the mailing in Sioux City was a continuous offense, and

d. That the innocent agent of the defendant did something in South Dakota.

Defendant is not accused of having delivered the letter (assuming that delivery is an offense). The record does not show he did anything after the deposit of the letter in Sioux City.

We grant that if a letter is unlawfully mailed, jurisdiction to prosecute in some district other than the one of mailing may be created by doing something in that district to aid the delivery of that letter. On such facts the mailing may in a sense become a continuous offense. It can become that, by what this Court has termed a co-operation which brings about :

“A continuous result that will not continue without the continuous co-operation of the causers to keep it up.”

In no other way can unlawful deposit for delivery become such offense as to invoke the application of R. S. 731. That is shown by the decisions we have cited (page 36, Original Argument), holding that the mailing is a completed offense, and by *U. S. v. Kissel*, 31 Sup. Ct. citing *U. S. v. Ervine*, 98 U. S., 450, declaring:

“It is also true, of course, that the mere continuation of the result of a crime does not continue the crime.”

It is carried to the logical end by decisions like that of *Olsen v. U. S.* (C. C. A.), 287 Fed., 89, that mailing *still* remains the gist of the offense.

But all this is academic. There is neither plea nor proof that defendant did anything whatever after the mailing of the letter exhibited in Count 7.

3—g.

That R. S. 731 does not apply is settled, too, by the decision in *Stever's* case. That statute was raised in the brief of the Government in the trial court. Now, if a letter mailed in Iowa and delivered in Kentucky were a *con inuatus* offense and invokes R. S. 731, there would have been jurisdiction in Kentucky, on the theory that the offense was begun in Iowa and completed in Kentucky. It is, therefore, obvious that holding there was no jurisdiction in Kentucky was a holding that that statute did not apply. If that be not so, there should have been no affirmance. And no amendment of statute can affect this argument. Section 731 R. S. has never been amended. When the *Stever* decision was made that statute was word for word exactly what it is now.

3—f.

The *Stever* decision settles as well that the doctrine of innocent agency has no applicability.

If innocent carriage by the establishment gives jurisdiction in a district other than where the mailing was done, then the Stever decision should have been a reversal instead of an affirmance. There was the same innocent agency at work in that case as there is in this and in every other where a letter duly stamped and addressed is mailed. We do not claim that defendant can shield himself with the plea that the agent was innocent. But this is not a question of *respondere superior*, but of venue. What we contend for is, merely, that the action of the post office establishment does not fix the place of trial. One who employs an innocent agent may be civilly proceeded against for what that agent does. But as said, that is irrelevant here, and the innocent agency theory is also disposed of in the same way as it is in the Stever decision, in Stewart's case (C. C. A.) 119 Fed., 89.

Both on reason and on authority it would seem to be apparent that the prosecution in South Dakota was in disregard of the Constitution.

IV.

There is failure to apprise of the nature of the accusation.

We are told that "a mere reading of the indictment" (26) refutes this contention. This indicates counsel is of opinion that the Constitution is complied with if defendant is advised, clearly, what statute he is accused of violating and of the place where it is proposed to

try him. All the authorities agree that the indictment may exhibit a fatal disregard of the Constitution though it be clear on said two points and though it gives much more of advance notice than does the one at bar. Its clarity on those two points does not relieve from certain fundamental requirements.

It must state matters "upon which issue could be formed for submission to a jury"—*Hess v. U. S.*, 124 U. S., at 486—which, of course, means that the charge must not be made by conclusions—*Carll v. U. S.*, 105 U. S., 611; *Cruikshank v. U. S.*, 92 U. S., 558.

Where the indictment asserts a corrupt intent it is insufficient where it is impossible to ascertain from it, except by conclusions, what acts will be relied on at the trial. *Boykin v. U. S. (C. C. A.)*, 11 Fed. 2nd Ed., at 485.

The court must be able to find the charge of crime "in the facts alleged, and not in the pleader's conclusions as to logical connection of facts," and it is not enough that there is a mere allegation that said acts were done pursuant to the conspiracy charged. *Tillinghast v. Richards*, Marshall, 225 Fed. at 229, 230, 232.

It is all bottomed upon the reasoning that accused is presumably innocent—and therefore has no knowledge of the facts charged against him—*Fontana v. U. S. (C. C. A.)* 262 Fed., 283—hence, requirement to plead with such certainty "as would clearly inform the defendant of the nature of the evidence to prove the existence of the scheme to defraud, with which they would be confronted at the trial." *Stewart v. U. S.*

(C. C. A.), 119 Fed. at 94; *Foster v. U. S.* (C. C. A.), 178 Fed. at 171.

The allegation of fact must be so distinct, direct, positive and affirmative as to enable accused to prepare for his defense. *Simmons v. U. S.*, 96 U. S., 360; *Hess v. U. S.*, 124 U. S., 483; *Cruickshank v. U. S.*, 92 U. S., 558; *Fontana v. U. S.* (C. C. A.), 262 Fed., 283, 286.

In statute made offenses it does not suffice to charge in the words of the statute—*U. S. v. Simmons*, 96 U. S., 360; *Carll v. U. S.*, 105 U. S., 611; *Hess v. U. S.*, 124 U. S. at 488; *U. S. v. Mann*, 95 U. S., 580.

There must not be undue length, great prolixity, *Stewart v. U. S.* (C. C. A.), 119 Fed., at 89; that such an indictment fails to inform of the nature of the accusation, and there must be no confusion.

4—a.

A word of amplification.

a. The prolixity and confusion are aggravated and obvious. (See original argument, pp. 48 to 53; and statement in brief for Government, pp. 3 to 8.) The fault is more aggravated than in *Hendrey v. U. S.* (C. C. A.), 5, 7, 8. More than in the indictment in *Stewart v. U. S.* (C. C. A.), 119 Fed., 89, point 3. This indictment is exhibited in the record (R., 54 to 62). And the trial court was in duty bound to follow the holding of the case that its indictment should be quashed. If that be not so, little was accomplished by the action of Congress making the Circuit Court of Appeals a court of last resort in specified cases.

b. A "mere reading" demonstrates the indictment is full of conclusions where there should be a statement of issuable facts apprising of what is to be met at the trial; and that there is vagueness—for example, nothing is said why one defendant should be held responsible for a letter written by another—or to have participated in causing it to be mailed or mailing it. (And see pp. 124, 201, 131 to 135.)

c. The allegation condemned in the Hess case, 124 U. S. at 486, is:

"Defendant having devised a scheme to defraud diverse persons unknown, intended to effect the same by inciting such other person to communicate with him through the post office, and received a letter on the subject."

The averment at bar is:

"Devised a scheme and artifice to defraud persons named, persons unknown and the Midland Corporation by false and fraudulent representations and promises, to part with money and property for Midland shares (R., 3).

d. On the authority of Hess v. U. S., 124 U. S., 483, the decision in Cruickshank v. U. S., 92 U. S., 542, holds that the following averments are too vague and general and lacked that certainty and precision required by the established rules of criminal pleadings, and were therefore insufficient in law:

"Defendants, with intent to hinder and prevent citizens, of African descent (named) in the free exercise and enjoyment of all of the rights,

privileges, immunities and protection given such citizens, and so deprived, because these persons were of such descent, and that said indictment specified no particular right the enjoyment of which the conspirators intended to hinder or prevent."

e. As a preparation for meeting at the trial that there was a scheme to defraud by inducing such parting with money (which could not be true if the shares, say, were worth more than it was planned to get for them), there is the plenary conclusion that the scheme was intended to defraud.

f. To prepare resistance to the charge that the mails were used, is an allegation which does not assert postage was prepaid or even that the letter was delivered by the establishment. If no stamps were affixed that should have been stated and thus the matter tested out on demurrer. If there were, and the envelope was lost, that should have been set forth so that defendant might prepare to sift any attempt at secondary evidence. It might happen, too, that if the stamp had been described it would have been so peculiar a one as that defendant was prepared to say he never had or used one, or that it was not in existence at the material time.

What authorized omitting the "essential element," the "essential ingredient" of prepayment of postage. Surely stamping is such element and ingredient. That is proved by numerous decisions that stress its importance (pp. 67, 68, original argument), and hold that

only by stamping is presumption raised that the duty of carriage and delivery was performed (pp. 76, 77, original argument).

What is it that advised defendant of why he was accused of misusing the mails when Count 7, unlike each of the first five, did not as much as assert that any postage had been affixed?—and how can any evidence cure this defect in the indictment?

What about the ambiguous allegation of venue by an allegation that may mean the causing was by action in South Dakota or by delivery there or by mailing in Sioux City (R., 5, 16, 18, 28, 29 and pp. 19, 20, original argument)?

How was defendant advised by this indictment that he would be tried for separate and distinct acts of his own? The indictment told him he need to defend only against joint acts. Suppose three charged with joint offending found on consultation that each was incarcerated in solitary confinement in different military prisons during all material times. They would feel they were prepared to meet the accusation. But were they, if some individual act while confined was what met them at the trial?

What advised defendant was to be charged with responsibility for what Van Riper may have done?

4—b.

As to merely following the words of the statute.

“All of the ingredients and essential facts constituting the offense must be charged though the statute omits some of them.” McNeil (C. C. A.), 150 Fed., 84; *Kessel v. U. S.*, 62 Fed., 60, 61.

"Charging in the words of the statute will suffice only where the statute itself directly expressly and without uncertainty or ambiguity sets forth every element necessary to constitute the offense." *Cruikshank v. U. S.*, 92, U. S., 553; *Hess v. U. S.*, 124 U. S., 483; *Carll v. U. S.*, 105 U. S., 612; *Blitz v. U. S.*, 14 Sup. Ct., 927; *Cook v. U. S.*, 17 Wall., 168.

"Where a statute is not thus specific it does not suffice to charge in the same generic terms that the statute uses." *Cruikshank v. U. S.*, 92 U. S., 556.

"Under such a statute as the one at bar there must, in addition to following the language of the statute, be a setting forth of the facts and circumstances not found in the statute, and such as will inform of the specific offense by means of additional particulars." *Hess v. U. S.*, 124 U. S., 483.

"While undoubtedly the language of the statute may be used in the general description of an offense, it must be accompanied with such statement of facts and circumstances as will inform the accused of the specific offense coming under the general description of the one with which he is charged." *Hess v. U. S.*, 124 U. S., 483.

The analysis of *Simmons v. U. S.*, 96 U. S., 360, made in *Hess v. U. S.*, 124 U. S., 483, is that an indictment was insufficient which merely followed the statute by alleging that defendants

"Did knowingly and unlawfully cause and procure to be used a still, boiler, and other vessels for the purpose of distilling, within the intent and meaning of the internal revenue law of the

United States, in a certain building and on certain premises, where vinegar was manufactured or produced."

In *U. S. v. Sauer*, 88 Fed., 253, it was said to be gravely doubtful whether the following allegation was sufficient to charge a penal offense. That allegation was:

"So devising and intending in and for executing such scheme and artifice to defraud, and for the obtaining of money under false pretenses and attempting so to do, caused to be conveyed and delivered by mail."

* * * * *

Why is not the indictment at bar a mere following of statute?

The allegation is that defendant having devised the alleged scheme did for the purposes of executing it or attempting so to do and with intention of executing or attempting so to do, "unlawfully, feloniously and knowingly, cause to be delivered by mail by the post office establishment of the United States." The statute prohibits "knowingly cause to be delivered by mail according to the direction thereon." The only difference is that the statute leaves out the words "by mail by the post office establishment of the United States" (R., 29). The omission is a distinction which creates no difference, because the statute prohibits causing to be delivered "by mail"—which rather strongly implies that either in deposit or receipt the letter will get into a post office or some other authorized depository.

The underlying reason is:

"Offenses created by statute as well as offenses at common law consist, with rare exceptions, of more than one ingredient, and the rule is universal that every ingredient of which the offense is comprised must be accurately and clearly expressed in the indictment, or the pleading will be held bad on demurrer." *U. S. v. Mann*, 95 U. S., 580.

V.

There is no allegation that should or can be strained into an averment that postage was prepaid—certainly none that meets the Hornbook law on pleading in indictments.

The pleading is unlawfully caused delivery according to direction of a letter previously placed in the post office for delivery by the establishment (*R.*, 29), not even that there was delivery.

To make the mere fact that one placed a letter in a post office for delivery by the establishment an allegation that postage was affixed, would require a chain of reasoning consisting of saying that as the letter was placed, and as it was the purpose of the placer that the establishment should deliver his letter, and as he could not well think his intention would be carried out by the establishment unless postage was prepaid, and since he desired delivery and knew he could not obtain it without prepaying postage—therefore, he prepaid it. In view of the unbroken line of authority on the requirements of pleading in indictments, it should hardly

be expected by anyone that any court will give sanction to a method of pleading that requires all this deduction, implication, intendment, and inference to present a required issuable fact.

There are too many cases, to cite them all, which rule that this form of criminal pleading is not permissible.

Every ingredient of the offense must be charged fully, directly and expressly and explicitly and with precision and certainty. *Cook v. U. S.*, 17 Wall, 168; *Cruikshank v. U. S.*, 92 U. S., 558; *Blitz v. U. S.*, 14 Sup. Ct., 927; *Pettibone v. U. S.*, 13 Sup. Ct., 545; *Hess v. U. S.*, 124 U. S., 483.

Even the failure to allege that the postage described was insufficient postage, though somewhat technical, brings the matter within the rule of precision in drawing indictment—*U. S. v. Morse*, 287 Fed., at 912.

Every constituent element of the offense must be charged positively and not by inference. *Ledbetter v. U. S.*, 18 Sup. Ct., 775; *Schutte v. U. S. (C. C. A.)*, 252 Fed., 214; *Harvey v. U. S.*, 126 Fed., 358.

Every element necessary to constitute the offense must be set forth fully, directly and expressly. *Carll v. U. S.*, 105 U. S., 611.

Every essential element involved in the offense or its proper definition must be charged with a clear distinct certain and express statement of facts. *Hess v. U. S.*, 124 U. S., 483; *Carll v. U. S.*, 105 U. S., 611; *Simmons v. U. S.*, 96 U. S., 362; *Blitz v. U. S.*, 14 Sup. Ct., 924, 927.

They must be *direct, positive and affirmative*. *Hess v. U. S.*, 124 U. S., 483.

The allegations must be *express*. *Carll v. U. S.*, 105 U. S., 612; *Evans v. U. S.*, 14 Sup. Ct., 936; *Cruickshank v. U. S.*, 92 U. S., 543, 558.

They must be *distinct and express*. *Carll v. U. S.*, 105 U. S., 611; *Cook v. U. S.*, 17 Wall., 174; *Cruickshank v. U. S.*, 92 U. S., 558.

It must not be necessary to resort to deduction. *Robinson v. U. S. (C. C. A.)*, 266 Fed., 247; *State v. Meysenburg (Mo.)*, 71 S. W., 229, and finding postage by allegation or evidence of delivery is pure deduction.

No inferential statement is permitted as to any element necessary to constitute the offense. *Pettibone v. U. S.*, 148 U. S., 197.

The allegation must be positive instead of made by *inference*. *Cruickshank v. U. S.*, 92 U. S., 558; *Carll v. U. S.*, 105 U. S., 611; *Blitz v. U. S.*, 14 Sup. Ct., 927; *Hess v. U. S.*, 124 U. S., 483.

This is fully and clearly raised. (See pp. 62 to 64, original argument.)

VI.

The statement of counsel (25) that the indictment was not amended is contradicted by both fact and law.

What was done?

The grand jury described the scheme. It asserted one that has a number of elements, to wit: The total of the capital stock (R., 4); the dealing with Statter (R., 5 to 8); conversion of the Statter stock (R., 7, 8); misrepresentations to the Executive Council of Iowa

and the Securities Commission of South Dakota (R., 8, 9); the contracting with Baine (R., 11, 12); to have Baine, Taylor and persons to be employed by them make described misrepresentations (R., 11, 12); to insert large advertisements in aid of the scheme (R., 12); cheating "victims" and the Midland (R., 3)—and also the items which the court submitted to the jury—which, for one thing, have no cheating except of the Midland (R., 453, 454). It is hornbook law that the proof must meet the very scheme charged. The very fact that but part of the elements were submitted admits that "the very scheme" was not proved. A charge that the scheme consisted of a mixture, say, counterfeiting and larceny, is not established by evidence that the sole object was larceny.

Why is not what was done here an amendment of the indictment? It was held in *Ex parte Bain*, 121 U. S. at 5, that because on motion of the Government the indictment be amended by striking out the words, "the comptroller of the currency and," Bain must be discharged on *habeas corpus*. The reason assigned is that under the Fifth amendment only grand juries can word indictments (7, 8); that changing the wording destroys the indictment even if the matter eliminated be surplusage or immaterial (9, 13); and that no court may say that without what was eliminated the grand jury would have indicted (10). To like effect is *Dodge v. U. S. (C. C. A.)*, 258 Fed., 300, and *Stewart v. U. S.*, 12 Fed. (2 ed.), 524; *U. S. v. Howard (C. C. A.)*, 132 Fed., at 344; *Ex parte Craig (C. C. A.)*, 282 Fed., at 156; *Katz v. U. S. (C. C. A.)*, 272 Fed. at 158.

The only difference is that the elimination at bar is infinitely more substantial and radical than the change in any of the cited cases—was here a change in the very structure of the scheme asserted by the Grand Jury. As to the applicability of the query in *Ex parte Bain*, how a court may say there would have been any indictment on evidence not touching the matter stricken out, we tender this inquiry: Suppose the only complaint had been buying stock with intent not to pay for it and obtaining a colorable subscription for the purpose of getting commissions. Suppose the only evidence had been that which is in this record, to wit, that defendant bought stock and was paying for it and that no commissions were ever obtained. Is it stretching the probabilities to say that there would have been no indictment.

How is this met?

Concede that what remained was in itself a complete scheme in no way dependent upon any of the other elements set forth in the indictment (25); concede there is nothing unusual or improper in withdrawing from the jury charges which in the judgment of the Court had not been sustained by the evidence; concede it is a rule in criminal law that proof of so much of an indictment as shows that defendant committed a substantial crime therein set forth is sufficient (25, 26). What of it? It simply ignores what was done, or, rather, what was not done. That a complete scheme was submitted does not meet that it was not the scheme presented by the Grand Jury. As well have answered that while the scheme submitted was

not mentioned in the indictment the complete nature of the scheme cured the submission. It is true what was done had the effect of holding that certain charges should be withdrawn because the evidence did not sustain them. But when the evidence fails to prove that the scheme was what is charged, while thereupon such evidence may be withdrawn, the withdrawal demands a direction to acquit, and the right to withdraw does not carry with it the right, instead, to tell a jury that the indictment is not the one returned but there may be a conviction of a scheme radically different from the one asserted by the Grand Jury. It is true that though all of a charge be not proved there may be conviction if the proof shows one offense that is charged was committed. That would rule, say, if on accusation that each of three letters was mailed the proof but showed the mailing of one of the three. It does not rule when the proof is of an offense other than the one indicted for.

As to the constitutional question aspect, there can be no controversy over the proposition that if the court does do what amounts to amending the indictment, there is involved a violation of the 5th Amendment. Upon this there is no conflict in authority. The sole question then is, did the court do what may fairly be termed an amending? If, by any method, it submitted what was not identical with the indictment returned that constitutes an amendment. In *ex parte Bain*, identity was held to be destroyed by striking out some six words that were confessedly surplusage. It was done on motion of the Government, on consent by

defendant, and by order of court on the motion. In the Dembowski case there was, by the same method, eliminated sufficient to save a count from being duplicitous. Methods may differ but the essence is not affected. What difference is there between what was done in these cases and what was done here? In each of them the result of the action was to submit to a jury less words than the Grand Jury had put into the indictment. How does the case differ from what it would be if the Government had moved for an order to strike out the 11 elements and the court had sustained the motion and made the order? In the supposed as in the actual case, there was submitted to the jury a different scheme than the one returned, and having less words than in the one returned.

The evidence must meet the identical scheme to defraud, which the indictment complains of.

Booth v. U. S. (C. C. A.), 139 Fed., 256;

Hendrey v. U. S. (C. C. A.), 233 Fed., 5;

Brown v. U. S. (C. C. A.), 146 Fed., 219.

See pp. 277 to 279, original argument.

It follows that if any but the "very scheme" is what is submitted, that is submitted which has been made different to what the Grand Jury created.

True it is, that it was at the conclusion of the trial and after counsel for plaintiff in error made a request that the court did what is now complained of (25). This request was not a consent to submitting a scheme other than the one returned—it was a request to acquit because of the variance. But it would not matter had

there been consent. Consent does not cure amending an indictment. *Dodge v. U. S.* (C. C. A.), 258 Fed., 300; *Stewart v. U. S.* (C. C. A.), 12 Fed. (2d ed.), 524. It seems to be conceded that the only indictment now in this case is the one submitted (23, 25). That must be so were there no concession. The defendant in error must be able to sustain the record as the trial court made it. *The Maria Martin*, 12 Wall., 31. The review is limited to the assignments of the plaintiff in error. *U. S. v. Blackfeather*, 15 Sup. Ct., 66—and there is this other angle: The instructions must be followed whether right or wrong. *Southern Railway v. Schuyler*, 227 U. S., 601; and it is presumed on appeal that the jury excluded from consideration as instructed. *Aetna Company v. Crowe* (C. C. A.), 154 Fed., 545, and decisions to like effect by courts of last resort in states are too numerous to cite. (See Second Dec. Dig., page 374.) As said in *Gladden v. Gabbert* (C. C. A.), 219 Fed., 285, it will not be presumed the trial judge permitted a verdict to stand which was any violation of the instructions.

If there was amending on the cases cited, here there was a most aggravated one. It cannot even be said that it was done by indirection, but that would be as fatal as if directly done. It cannot be amended by indirection. *U. S. v. Howard* (C. C. A.), 32 Fed., at 344; and on amendment jurisdiction and power end. *Dodge v. U. S.* (C. C. A.), 258 Fed., at 305; *ex parte Craig* (C. C. A.), 282 Fed., at 156.

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How does what was done differ in law from that which is universally condemned by the authorities? Why was telling the jury that it had nothing but a small part of the elements in the indictment returned by the grand jury to consider not an elimination of all other elements thus returned?

Certainly no differentiation may rest on the quality of what was eliminated. Taking most of the main part of the structure of the scheme out was certainly as substantial a striking out as striking a few words that are confessedly surplusage, or changing 20 Smith St. to 80 Smith St.

Is not what was eliminated as substantial as the elimination in the Dembowski case (252 Fed., 802), which took out part of the allegations merely to save the count from being duplicitous? (And see pages 1 to 10, original argument.)

As to the citations for the Government.

Silkworth v. U. S. (C. C. A.), 10 Fed. 2d ed., 715, holds *ex parte* Bain to be inapplicable to what was done in the *Silkworth* case. This general statement is all there is. The decision does, however, emphasize statements that are obviously in conflict with *ex parte* Bain. For example: that it is material that matter eliminated is immaterial or surplusage. As for the rest, the decision is utterly irrelevant. The court did no amending. It never told the jury that its consideration was limited to an indictment which differed from one returned as to stated matters. It merely instructed that of various schemes charged against different defendants, there was one which the evidence did not tend to

sustain. Finally, it holds to two propositions which are irrelevant here, to wit, that proving one of several means or methods alleged will warrant conviction, says where an indictment charges several false pretenses, it suffices if one is sufficiently alleged. Of course, if an indictment charged obtaining money by several false pretenses, it suffices if one of these false pretenses is shown. Of course, if it be a charge of an assault, both with a pistol and a knife, it suffices to show an assault with either. But that does not touch the question presented here. It does not support a claim that where there is but one scheme alleged and it consists of say 12 elements, each one as vital as any one of the others, that the court may tell the jury that all remaining in the indictment is some 2 or 3 of the 12 elements (R., 453).

U. S. v. Smith, a district court decision found on page 165 of 222 Fed. has no question of amendment in it, and all it holds is that of several false representations set forth it suffices if the proof shows one of them that is relevant and efficient.

While it does not constitute a variance that there is failure to prove the guilt of every defendant included in the indictment if the proof suffices to sustain the conviction had of some of them, that is utterly different from charging a particularly described scheme, described by stating a number of constituent elements and then proving a scheme exhibiting, say, but one of these elements.

VII.

One of the matters counsel did "not deem it necessary to refer to" is that the prosecution on an indictment returned in the Western Division, charging offending in the Southern Division, was transferred to the Southern Division, but on the application of the Government.

The powers of the Federal Courts are presumed against. Silence gives them nothing. The only provision for transfer is in section 53, Judicial Code; and, in terms, on application of defendant. This, according to legislative history, was intended as a favor to him. He was not bound to accept, and the Government always had the right to indict in the division of offending. If any difficulty arise from non-acceptance, it results from the election to indict in a division other than the one of offending. (See pp. 46 to 49, original argument; R., 73, 70, 52, 53.)

7—a.

In the same neglected class is that delivery was permitted to be testified to over objection that same is irrelevant to the indictment (R., 285; and see pp. 83, 84, original argument).

7—b.

In the same neglected class is duplicity. And yet that is a fairly important and substantial point. It is conceded the offense of causing delivery is charged.

We contend the same count also charges unlawful deposit. True, it is said in the Loisel decision that that is but an explanation of how the letter got into the mail. We answer that no explanation is needed, that the allegation has every earmark of an *accusation*, and what the Loisel decision says as to the right to elect to prosecute in Iowa, itself, shows that the so-called explanatory matter is the *charge of an offense*. In other words, if there is such right to elect, it must be either because the deposit is the causing, in which event South Dakota has no jurisdiction, or else the right to prosecute in Iowa could exist only because there is an *accusation* of mailing in Iowa. (See pp. 24, 25, 55, 56, original argument).

VIII.

As to the assertion that the evidence suffices to make it a jury question whether defendant caused the mailing of the letter found in Count 7—and see post.

We agree that the weight of the evidence is not for review; we are asserting the absence of evidence.

The opposing argument is (*a*) that defendant signed the letter and (*b*) that Christensen says it came to him by mail (28, 29). Assume the signing. It alone does not prove that signer mailed or caused to be mailed. This, (*a*) because letters can be delivered by means other than the mail, and (*b*) one may conclude not to mail what he intended to send by mail and his letter may finally be mailed without his knowledge and consent—and the prosecution has a burden which includes negating these possibilities (See pp. 68, 69, original

argument). In other words, the signing does no more than show defendant did one thing without which it could not be found that he caused a letter to be mailed—the letter had to exist or it could not be mailed. But that it existed does not prove that its writer caused it to be mailed. We submit this would be the situation upon adding the naked fact that it reached addressee by mail—that but proves that someone caused its mailing. But be that as it may, the proof of delivery is by testimony that should not have been received, and, therefore, should not be considered. Count 7 does not allege delivery, and the testimony, as before said, went in despite objection that it was irrelevant to the indictment.

IX

As to the assertion that the jury was justified in finding that the Count 7 letter was "in furtherance of the re-sale scheme" (29). See post.

The opposing argument on this head is that said assertion is sustained because (a) that having found the scheme the jury could hardly have failed to find that the letter was in furtherance "of the scheme"—i. e. "re-sale scheme"; (b) because a year later when "the scheme was in full operation" and the stock had been advanced to \$125 a share Christensen went to defendant's office and made a similar agreement as to which defendant drew the papers, and (c) that the jury doubtless found it impossible to discover any honest purpose on part of an officer of the Midland in assisting a

purchaser at par to obtain stock to be sold at a profit, to be divided with an agent (30). We beg to answer:

a. That long as the indictment is it has no charge of a "re sale scheme"; no complaint of aiding a buyer to get stock with a view of reselling it at a profit and dividing the profit—all it has is a charge that "defendants" schemed to buy stock for themselves, with intent not to pay for it, to resell that stock at a profit and to convert that profit (R., 13).

b. The transaction as to which defendant drew the papers is not said to be a purchase at par. All that appears is that a note for \$100,000 was given, that re sale was to be at \$150 a share, and that the profit was to be divided between Christensen and Spellings and Colby (R., 281).

c. Aside from there being no relevant charge, assisting stock salesmen in getting re sale contracts was no wrong on part of an officer of the Midland. The assistance helped sell stock and that is what the corporation wanted and needed to have done.

d. It is novel argument that finding the existence of a scheme makes it a matter of course that any letter soever was an attempt to further that scheme.

X.

The Government contends there was no error with respect to evidence as to character, either in excluding testimony or in the charge to the jury (30).

As to the exclusion. After the witness Harding had stated his acquaintanceship with and relations to defendant he was asked this:

Question: Based upon your acquaintance with the defendant Salinger, what do you say as to what his character is and has been, whether it has been good for probity and honesty and integrity?

The Government objects this is wholly incompetent for any purpose, no proper foundation laid.

Court: I take it incompetent for anyone to say what a man's character is. The question is what his general reputation is. Sustained (R., 417, 418).

Counsel for the Government defends this by saying that he finds nothing in the brief for plaintiff in error which justifies the conclusion that it is error to exclude direct testimony as to character, and that he has always understood the rule to be that reputation only may be inquired into (30). Notwithstanding this, we are constrained to say that both the trial court and counsel have misunderstood the law on this head. For support of what was done counsel says that three decisions cited have a careful review of the authorities and that two of these should be looked into (32). In not one of them is there any hint even that all that is admissible is reputation evidence. In one, *Kreiner v. U. S.*, 11 Fed., 2d ed., 722, it is said:

"It is undoubted that one on trial in a criminal case is entitled to introduce evidence of his good character."

The turning point in another, *Le More v. U. S.* (C. C. A.), 253 Fed., at 894, is that: "The district

judge charged fully upon the effect of evidence of good character." Without reference to the said holdings in the cases cited by the Government, it is thoroughly well settled that the understanding of trial judge and counsel is a mistaken one.

In *Edgington v. U. S.*, 164 U. S., at 363, we find it said:

"It is not necessary to cite authorities to show that, in criminal prosecutions, the accused will be allowed to call witnesses to show that his character was such as would make it unlikely that he would be guilty of the particular crime with which he is charged."

In *Rowe v. U. S. (C. C. A.)*, 97 Fed., 797, that "evidence of the good character of a defendant is to be considered by the jury in all cases," etc. To like effect are *Oppenheim v. U. S. (C. C. A.)*, 241 Fed., at 621 to 628; *Kalmanson v. U. S. (C. C. A.)*, 287 Fed., at 72; *Hermansky v. U. S. (C. C. A.)*, 7 Fed. (2nd), at 460, and *Hoback v. U. S. (C. C. A.)*, 284 Fed., at 533.

It is now the settled law that good character * * * may be shown in all criminal cases, whether the other evidence leaves the mind in doubt or not.

Searway v. U. S. (C. C. A.), 184 Fed., 716; *Hume v. U. S.*, 182 Fed., 485, 3 Ency. of Evidence, pages 8 and 11; *Commonwealth v. Cleary*, 135 Pa. State, 64, 68.

It is said in *Remsen v. People*, 42 N. Y., 6:

"There is no case in which the jury may not in the exercise of sound judgment give a prisoner the benefit of a previous good character"—and that writers of authority upon evidence and

upon common law unite in saying that the good character of the accused is an ingredient which ought always to be submitted to the consideration of the jury, citing: Russell, Crimes, 3 Greenleaf Evidence, section 35; Roscoe Criminal Evidence, 89-90.

Though counsel cites *Kreiner v. U. S.*, 11 Fed. (2d), 722, he has overlooked the following statement in it:

“Reputation is one thing and character another, and that it has been said that character and reputation are as distinct as are destination and journey.”

And he seems to have overlooked that, as matter of common knowledge, men who have for years enjoyed good reputations turned out to be criminals.

It would be a strange state of the law for it to declare that evidence as to character tends to aid the plea of not guilty on the reasoning that one having a certain character would not be as likely to be guilty of what is charged as one who did not possess it—and after declaring that reputation evidence and character evidence are utterly different—then to make it the rule that reputation evidence alone is to be received.

What is here presented is that the court erred in excluding the character testimony; that it erred in forcing upon defendant general reputation evidence as a substitute for character evidence—and that this might easily result in refusing to hear one on character who is competent to speak to it and also refusing to hear him on general reputation because he is not competent to speak to that.

10a.

As to the contention that what occurred on the instructions is not justly open to objection:

Defendant asked a charge "as to the weight to be given evidence of good character and good reputation, in connection with the presumption of innocence and the doctrine of reasonable doubt."

Court: "It has been proven and established by the evidence, and there is no dispute about it, that the defendant was a man whose reputation for truth and veracity and probity was good. * * * And those are circumstances which the jury should take into consideration along with other matters that have been laid before you" (R., 466, 467).

Counsel for Defendant: "I am contrained to except to this instruction as not fully stating what the effect of the law is as to good character and good reputation, honesty, integrity in connection with the presumption of innocence, and the creation of a reasonable doubt" (R., 467).

Nothing further was charged.

Counsel says that "the charge given seems to have been sufficient" (32), which is saying that where a court is asked to instruct on the effect of character and reputation evidence on the presumption of innocence and the creation of a reasonable doubt, it is sufficient to say it is not disputed that defendant was one whose reputation for truth, veracity, and probity was good, and to consider that as a circumstance, etc. It is fairly

obvious that while this tells the jury that a good reputation exists, it fails to respond to a request to tell the jury what the existence of this reputation does as to the presumption of innocence and the creation of a reasonable doubt. A situation almost identical developed in *Suitkin v. U. S.* (C. C. A.), 265 Fed., 492. In it the court charged, speaking of this class of testimony, that the jury

"should give that fact such weight as you think it is entitled to, taking into consideration all the other facts and circumstances established by the evidence."

On reversing, the court said that this was erroneous because it placed this class of testimony

"on the same basis as the evidence relating to the substantive acts charged in the indictment, and directed the jury to give it such weight as they might think it entitled to, without furnishing them the legal scales in which to weigh it, namely that a reputation for good character, if established, alone may create a reasonable doubt, although without it the other evidence would be convincing."

And said response is in conflict also with *State v. Brown*, 39 Utah, 140, approved in *Egan v. U. S.*, 287 Fed., 969, and in conflict also with *People v. Bell*, 49 Cal., 485.

10b.

Something is said in the brief for the Government that the case is affected by absence "of a request for

specific instructions" (32). Just how much more specific should counsel for defendant have been? The court had finished the reading of its charge without saying a word either about evidence of good reputation or evidence of good character. Counsel asked it to speak on that evidence and to tell the jury what bearing it had on the presumption of innocence and the doctrine of reasonable doubt. The court understood because it attempted to meet the request. But it did this by merely saying that defendants having a good reputation was not disputed. In other words, it still failed to say what the effect of that reputation was on those two heads. Counsel again put it before the judge that he still had said nothing on what effect the law gave to character and reputation evidence with reference to those two heads. How much more specific was it required to be in order to advise the court that it had maintained silence on the effect of this class of testimony. The decision in *Hermansky v. U. S.* (C. C. A.) 7 Fed. (2nd.) at 460, goes off on the fact, among others, that defendant "did not except to the failure of the court to instruct thereon." Can it well be said that there was such failure to except here? In *Edgington v. U. S.*, 164 U. S. at 365 the exception was:

"We except to that part of the charge in stating the effect of good character, the defendant claiming that it should not be a force only in doubtful cases, but should be considered by the jury in connection with all the evidence as to whether or not on all the evidence there is a reasonable doubt."

The court holds that this exception is sufficient and—

“Waiving the question as to how far this rule is justly applicable to the case of a charge in a criminal case, we are of opinion that, in the present instance, the criticism is not well founded. The paragraph of the charge excepted to does not contain instructions on separate and distinct propositions, some of which are sound and others not so. The subject treated of in the paragraph is the single one of the proper effect to be given by the jury to the evidence of the defendant's good character. Fair understanding of the meaning of the instruction can not be reached without reading and weighing the entire paragraph. There would have been more room for just criticism had the defendant taken exception to sentences or phrases detached from their connection.”

No great strictness as to the manner of excepting would seem to be required. According to *Cohen v. U. S.*, (C. C. A.), 282 Fed., at 872, it is the duty of the judge to instruct the jury, among other things, as to the manner in which it should accept and consider such testimony, and the weight which they might give to it (872, 873), even though the request was in such form as that the court was under no duty to charge as requested—that

“Nevertheless, the request called for a charge on this point, for obviously, defendant was entitled to have the jury instructed on the nature of the evidence of reputation for good character,

the manner in which they would accept and consider it, and the weight which they might give to it."

It is said in *Ducett v. State* (Ala.), 65 Southern, 352, that if there is evidence tending to prove the general good character of defendant, he is entitled to have the jury instructed as to the proper function and effect of such evidence.

In *Oppenheim v. U. S.* (C. C. A.), 241 Fed., at 628, there was found such "a plain error" as to demand consideration and reversal, "although no objection or exception was taken to it."

Why is it not like error where a court is told that it had not yet told the jury the effect to be given character evidence, and remains silent?

Assume for the sake of argument, that reputation only was receivable. It was received, but the instruction, as seen, fails utterly to meet the duty of the court as to instructing on the effect of such reputation evidence.

10c.

There are intimations in some few of the few decisions cited by the Government on this head that the court is not bound to charge in the words of the Edgington decision. It should be a sufficient answer that defendant made no request that there should be such charge, and that the complaint is not so much of what the court did say but that it declined to say anything as to the effect of this class of testimony upon the pre-

sumption of innocence and creation of a reasonable doubt.

Be that as it may, it has many times been *decided* that it is error not to charge in at least the substance of what the Edgington decision says.

In *Cohen v. U. S.* (C. C. A.), 282 Fed., 873, it is ruled that said decision requires a charge, in substance, that reputation of defendant's good character is a fact which when considered in connection with all the other evidence in the case, like other facts, may generate a reasonable doubt.

It is held in *Taylor v. State*, 149 Ala., 32, and *Commonwealth v. Leonard* (Mass.), 4 N. E., 103, that an instruction is due which is so near a verbatim copy of what is said in the Edgington decision as that it might have been quoted from it. In *Kalmanson v. U. S.* (C. C. A.), 287 Fed., at 72, it is stressed that a request to charge which was denied was in words that "were almost a quotation from Edgington *v. U. S.*" In *Egan v. U. S.* (C. C. A.), 280 Fed., 968, one ground of reversal is that the trial court, though requested so to do, declined to give a charge which was "offered in the identical language of the Edgington opinion," and it is said:

"It will be observed that the prayer offered is in the identical language of this (Edgington opinion), announcing the law and condemning an instruction as equivocal as the one contained in the charge of the court below."

The decisions cited by the Government, to wit, *Le More v. U. S.*, 253 Fed., 887, and *Kauffman v. U. S.*, 282

Fed., 776, and *Kreiner v. U. S.*, 11 Fed. (2d), 722, rule that the court was not "bound to instruct in accordance with request that good character when proven might of itself generate a reasonable doubt of the guilt of defendant." It is sufficient answer that no such request was made in this case.

XI.

Many matters are disposed of with the statement: "We do not deem it necessary to refer to the many matters urged as grounds for reversal" (32), to wit:

XII.

The indictment is fatally defective because both neither plea or proof says anything about the value of the Midland shares.

This silence is the same as an affirmative statement that they were worth all or more than was obtained for them. *State v. Meysenburg* (Mo.), 71 S. W., 229, 232; 1 Bish. Cr. Pro., sections 86, 88. 2 Grant Cas., 385, rules:

"In the spirit of that principle which presumes innocence until guilt be established, we infer that what is not charged in an indictment does not exist, and it is the business of the pleader to exclude by proper averments that conclusion to which the accused is thus entitled."

If the indictment had said that the stock was worth more than it was schemed to obtain for it—could there

be claim that there was a scheme with intent to defraud?

The contention now being made is squarely sustained in *Miller v. U. S. (C. C. A.)*, 174 Fed., 35, and *U. S. v. Schwartz*, 230 Fed., at 537. Each speaks without reference to the other, and each rests on the holding that there is no evidence of a fraudulent intent in selling shares when there is no evidence what the shares are worth. To like effect is *U. S. v. Stickle*, 15 Fed., 798, which holds there must be an intention not to give an equivalent. And *State v. Hinkley*, 132 Iowa, 936, rules:

“One purchasing corporate stock at less than par value is not prejudiced by representation, though false, that it is paid up and non-assessable.”

There is no avoiding these decisions except by striking out of the statute the basic predicate that it must be a scheme with intent to defraud.

Numerous decisions that do not in terms support our contention and even some that appear to run counter to it do support us by stressing the fact, for example, that defendant succeeded “in perpetrating a swindle upon those he induced to buy stock.” *Watlington v. U. S. (C. C. A.)*, 233 Fed., 240, and see pp. 267, 268, 269, Original Argument.

Wilson v. U. S. (C. C. A.), 275 Fed., 310, 314, seeks to differentiate the case of *Schwartz*, 230 Fed., 537, by saying that while the indictment in that case did fail to allege the real value of the real estate to be sold, the case arose on demurrer. We are at some loss to

understand how that would affect the decision in the case.

The second differentiation is that in the Schwartz indictment "there was an absence of any averments showing a real purpose to defraud purchasers out of their money." That does not create a difference, but a similarity. For, the exact complaint at bar is that the indictment lacks such averments.

12a.

It is not enough to charge that there was a scheme to defraud.

Epithets are not fact statements.—*Hess v. U. S.*; *Post v. U. S.*, 113 Fed. 885; *White v. U. S.*, 113 Fed. 854.

There should be a correct charge as to the necessity of intent to deceive.—*McCarthy v. United States*, 187 Fed. 118.

As the intent is the gist, an indictment is fatally defective if it sets forth no facts from which this essential may rightfully be inferred.—*Post*, 113 Fed. 854, citing *Durland*, 16 Sup. Ct. Rep. 508,—and both hold that without the existence of this essential there can not be a scheme to defraud. To like effect is the case of *Miller*, 133 Fed. 342, citing *Ryan*, 123 Fed. 634; *Clark*, 121 Fed. 190, and *Durland*, *supra*. And to like effect is *Tillinghast*, 225 Fed. 230; *Benson*, 58 Fed. 962.

Where the charge involves presenting fraudulent claims that are set out, but there is no statement in what respect they were fraudulent, there is nothing but a conclusion; and removal should not be ordered.—*Greene*, 100 Fed. 941.

The cases that seem to dissent from the holding in the case of Miller and Schwartz, reflect neither the better reason nor the weight of authority. For example, *Wilson v. U. S.* (C. C. A.), 190 Fed., 434, declines to follow the Miller decision insofar as same is "in conflict with the conclusions stated." There is no conflict because the Miller decision settles something which could not have arisen in the Wilson case. The Wilson case (190 Fed., 434), rests on *Horner v. U. S.* (C. C. A.), 182 Fed., 727, wherein it is said: "It is sufficiently alleged the stock of the mining corporation was not of the value that the defendants were to falsely represent it to be," and there cannot well be a conflict between a decision that the absence of such allegation is fatal, and another which has no occasion to deal with that question because the indictment in it has the very thing for the lack of which the first decision condemned the indictment.

12b.

Wilson v. U. S. (C. C. A.), 275 Fed., 310, 314, is hardly relevant to the indictment exhibited. It *does* charge a scheme to induce parting with money in the purchase of stock and has the allegation that defendants acted, "well knowing that such stock was not worth the price to which it was their intention and purpose to induce the victims to pay for it." Moreover, no attack was made below. All this somewhat weakens the random remark, "if the defects existed and we do not think they did," and it is further weakened

by adding that the defects so spoken to were such "which under the rule were cured by verdict."

And *Wilson v. U. S.* (C. C. A.), 190 Fed. at 439, is hardly consistent with itself. Though it declines to follow the *Miller* decision it does say that, "if there was no intention to deprive there would be no intention to defraud." Any decision that holds depriving to be essential and then holds that it does not matter what the value of the shares were, seems to proceed by running a pencil through part of the statute.

12c.

Cases like *New South Farm Company*, 36 Sup. Ct., 505, 507, 508, do not support opposition to our position. Each and every one in that line of decisions deals with a misrepresentation *as to character and kind*. A complete analysis of them is that if it is schemed to sell a Steinway piano with purpose to deliver a hand-organ, the seller may not defend with testimony that the hand-organ was worth as much as the piano. Of course not. The buyer was not intending to buy a hand-organ no matter how valuable.

Here there is no claim there was a scheme to sell shares with intent to deliver something other than shares. (See pp. 271, 272, Orig. Arg.)

The attacks are in ground 12, Motion to Quash (53, 54); ground 7, Demurrer (64); ground 24, Motion to Direct (426)—and in Request 18 (432, 433).

XIII.

It is true the Court eliminated one class of alleged fraudulent representations, to wit, those dealing with profits to be expected. But none others were eliminated. For example, the whiskey incident remained. And representations that the salesman was or had been the head of the Cudahy Company and promises that money would be refunded or profit paid over merely on asking the officers of the Midland to do this for the owner of the stock.

As to what remained it was of course essential that whatever claimed in the way of representations was made with intent to defraud. The Court was asked to charge that this intent was essential, and declined to do so, and gave no equivalent. (See original argument, pp. 187, 188).

"The proposition that there can be no conviction in the absence of an actual fraudulent intent no matter how unsuccessful their banking scheme proves to be or how inconsistent with any sound judgment they were, is not sufficiently supplied by an instruction that guilt must be proved beyond a reasonable doubt, and the repeated use of the word 'fraudulent' in defining the conduct of respondents would not make it criminal." Hendrey, 233 Fed., 18.

XIV.

The case was tried as if a conspiracy were charged.

The indictment has no conspiracy count though it does charge that whatever is complained of was done

by "defendants." Notwithstanding this, the court received letters written by Sawyer. It received Exhibit 305, a letter from Sawyer to Will, enclosing a stock certificate. It is the letter set forth in count 2 of the indictment. It was objected to, *inter alia*, for being hearsay and not binding on defendant (296), and others (285, 286, 292, 293, 296). For example, letter by Sawyer sending dividend checks with false claims that the dividend had been earned by legitimate profits of the corporation. The stock subscriptions of Martin and Beaman and Day were received, though it is confessed that defendant had nothing to do with these and that they were respectively obtained by Burlingame and Sawyer. (See pp. 131 to 135, Original Argument.) The witness who gave summaries from the books was permitted to testify as to transactions with dummy subscribers with whom confessedly defendant had nothing to do.

Evidently on the theory that rules governing a conspiracy indictment governed the court received testimony that a bookkeeper would make entries applying subscriptions as a credit upon original subscriptions at the request of the owners of the original stock, say like Taylor (229, 378, Original Argument).

A mass of testimony as to representations and promises stock salesmen had made was received without attempt to show that defendant was in any way chargeable therewith.

What this comes to is that the Government was given the benefit of that latitude in testimony which is per-

mitted on a conspiracy indictment and at the same time was relieved from a burden it would have on such indictment, namely, to show that the scheme included an intent to use the mails. *Farmer v. U. S.* (C. C. A.), 223 Fed., at 907.

More—here is a charge of joint promises, joint representing, joint deposit of letters. Had these defendants been dealt with accordingly, it would probably have proved impossible to show that the three jointly did any of these things. Of course, in conspiracy, it would suffice that any one of them did it in pursuance of the conspiracy. But there is no conspiracy count. And it was error to rest on the naked conclusion that defendants did what was complained of. It is but a naked conclusion requiring proof that could be nothing but a conclusion. No doubt one may be held to have personally placed a letter or made a promise if he did it by an agent, or if a member of his partnership did the act. Usually, where there is an attempt to fasten liability on one for something done by another, facts exhibiting such agency or partnership and the like are set forth. That was not done in this case. (See 136 to 139, original argument.)

The opposing brief intimates that ours made the work of the prosecution hard if to be finished in rule time. But time is found to point out the colorable subscription on part of Martin, which confessedly Burlingame alone obtained and with which defendant had no connection whatever. In fact, counsel admits it was at the request of Burlingame, and at this point

seems to have lapsed into the belief that he was dealing with a conspiracy indictment—and also to forget that Burlingame was acquitted. (11, 12.) So as to the colorable subscription on part of Sawyer (12). On pages 12 and 13, we have quite a full statement as to the doings of Sawyer in getting colorable subscriptions.

Pages 19 and 20 seem to be devoted to the “fake” dividend—admittedly eliminated below, and which is the child of Sawyer.

XV.

Erroneously making defendant a fiduciary and under duty to have sales above par made without commissions.

The court instructed that the defendants were fiduciaries; that they occupied a position akin to that of a trustee; that this obligated them to act in the uttermost good faith with subscribers and those solicited to subscribe; that among other things this made it their duty, if stock could be sold at a premium, to see to it that this premium went into the treasury instead of affording commissions to salesmen (R., 509-10-11). There is no allegation in the indictment to cover such a charge. The indictment complains only of things done and makes no complaint of failure to do, and has no accusation of violation of trust on part of anyone. This instruction made it possible to convict for not having such sales made without commission though this would breach a contract which gave exclusive charge of sell-

ing to Baine and later to Taylor, and which stipulated what commission should be paid for so doing.

The court declined to have defendants informed as to what fact basis there is for said accusation (Ground 24, motion for bill of particulars, R., 50); overruled ground 30, demurrer (72), and ground 21, motion to direct (21), and declined to give instruction 1-*b* (428), 22 (433), 23 (434), 32 (433), and 33 (434).

And it disregarded the following exception (469):

"We except to the charge that the defendant Salinger was in a controlling position and that this affected the question of his having participated in diverting the premium; the basis of the exception being there is absolutely no evidence as to just what position or what powers the defendant Salinger held except to designate it by a title, and no evidence of what that would enable him to control, or as to what his powers in his office were."

XVI.

The error of receiving testimony as to, say, words and acts of persons who were both in law and fact strangers to defendant and whose actions he never knew of.

These were received over objection that they were incompetent and that there is no charge of conspiracy, no evidence that these persons were in the employ or agents of defendant; that on the contrary it appears that they were employees of some one other than defendant, to wit, Baine and Taylor; there is no evidence

that defendant ever delegated to Taylor or Baine the power to employ any one in behalf of defendant, nor that either defendant ever ratified any employment on part of Baine or Taylor, or that either had knowledge or notice of any representations made by these salesmen or any one in the employ of Baine or Taylor. It appears from the testimony of the Government that defendant made no representations and did not authorize or direct said persons or either of them to make them; that same is not binding on defendant (262, 263).

This line of testimony was received days on end. It included the incident of Molinare using drinks of whiskey to persuade in subscribing.

All this was properly and fully raised. (Grounds 41, 42, motion to strike, 404; grounds 10, 23 and 25, motion to direct, 423, 425, 526; and by requests 13 and 19, 432, 433).

“But, aside from exceptions of this character, the rule is firmly established that declarations of third persons cannot be introduced in evidence against the defendant on the trial of a criminal case, in the absence of other substantial evidence tending to prove that such third person is speaking or acting for and on behalf of the defendant and with the defendant’s knowledge and consent. Upon this proposition there is no conflict in the authorities.”

M’Whorter v. U. S., 281 Fed. at 121,
(C. C. A.).

There is an absolute dearth of testimony connecting defendant with any of the salesmen with whose acts

it was sought to affect him. Nothing appears that puts the case within the rule of such decisions as that of *Pandolfo v. U. S. (C. C. A.)*, 286 Fed., 17; *Whitehead v. U. S. (C. C. A.)*, 245 Fed., 385; *Preeman v. U. S. (C. C. A.)*, 244 Fed., 1; *Roberson v. U. S. (C. C. A.)*, 284 Fed., 506.

16a.

It appears over and again, and without dispute, that the stock salesmen whose alleged representations and actions were received were the employees and under the control of Baine and later of Taylor (R., 158, 160, 155, 134, 152, 163). Testimony as to the doings and sayings of men for whom no relationship with defendant is made to appear—who on the record are utter strangers to him—with not a word or a circumstance to indicate he ever knew what they said or did.

There is the testimony dealing with Molinare and the whiskey incident (303). It is true the Court did tell the jury that this whiskey method was not covered by the indictment. But it would seem to be obvious that this did not remove the prejudice. (See pp., 150 to 156, original argument.)

Gaffney and Morgan are in a class as to which there is no evidence of any agency for any purpose and it was permitted for the jury to hear alleged representation made by these men that obviously would create great prejudice. Griffin and Beaton are in the same class (305, 398, 399). And Worth.

The Court permitted what one Snell had said though the only evidence of his agency was that he was in

company with Colby at the time. (See pp., 160, 161, original argument.)

16b.

It is difficult to understand on what theory the Court received testimony that salesmen exhibited a kit or prospectus, in the face of the fact that the undisputed testimony for the government is that Baine prepared this kit and gave it to his own salesmen. (See pp., 179, 180, Orig. Arg.)

The typical objection included hearsay, not binding on defendant, no proper foundation laid, and incompetent, irrelevant and immaterial (298, 299, 310).

Moreover it was presented in Request 1-e (429), that there is no evidence that anything contained in the letters of Gannon, B. I. Salinger, Sr., Leslie, Hamilton, Weldon and Carleton, or any letter found in the kit contained any false statement and you must treat what is said in those letters to be true. All said on the point is the statement of Taylor that he does not after all this lapse of time know of a single false statement contained in the kit (133).

There were other violations of the rules governing the foundation to be laid to establish agency.

Hix was asked:

"Who was the second man who called on you and purported to be an agent?"

"Over objection this question was repeated in the sense of asking for the third man, etc.

"The objection was that purported agency may not be established by the conduct or assertions of the alleged agent" (143).

Next Hix was asked:

"Q. Did Ewing represent himself to be a salesman for the Midland Packing Company?

"And over objection that this was incompetent, and that agency may not be proved by the representations or by repeating the assertions of an alleged agent, answered 'Yes,' and further that Ewing solicited Hix to purchase stock in the Midland" (142).

16c.

The Government attempted to fortify its claim of fraudulent representations and promises by impeachment of its own witnesses.

The main witnesses for the Government were Taylor, Baine, Krebs, Colby, Lohman, and Spellings. Each of them testified he never made a fraudulent statement or representation and never made a contract without good faith intention to perform; that conditions beyond their control made it impossible to perform some of these engagements within the time allowed (133, 152, 153, 154, 158, 160, 166). But the Government is attempting in effect to impeach these witnesses by making the contention that whatever representations and statements and promises these witnesses made were false and fraudulent.

One who uses a witness to support his contentions, and where that party invokes the testimony of these witnesses when it suits their purpose, he may not in argument question their veracity.

Choctaw v. Newton (C. C. A.), 140 Fed., 225.

Tarsney v. U. S., 48 Fed., 818.

A party may not destroy the testimony of his own witness by asserting that answers to certain questions which the witness refused to answer would have disclosed facts supporting the plea of the party.

Ashley's Case (C. C. A.), 83 Fed., 534.

He may show his witnesses were mistaken, but not that they were otherwise discredited.

Drayvo v. Fabel, 10 Sup. Ct., 171.

Prettyman's Case (Iowa), 192 N. W., at 417.

See ground 24, motion to direct (24), and request, 21 (433).

XVII.

As to representations now claimed to have been made by defendant.

That the charging clause asserts by way of conclusion that such were made and known to be false when made, is so (R., 3, 15). But fact allegations on that head are scarce and evidence of their making is scarce. As to *scienter*, there is no evidence.

There is a charge as to certain representations made to the Securities Commission of South Dakota (15). The indictment says that this was not for the purpose of obtaining stock subscription but to continue in force authority granted to sell stock in South Dakota. The court eliminated this (459, 453). Be that as it may, these representations were not made to victims and are, therefore, not within the indictment, had they been proved. Aside from what may have been said or written to the buyer dealt with in Count 7 (which are

spoken to in another connection) there is just one more charged representation and an ambiguous and peculiar one. It is that it was intended Baine and Taylor would, under their contract of employment, employ a large number of salesmen and agents to solicit purchase of stock and were to do this for the purpose of creating confidence as to legitimate purposes and objects of the corporation to erect and successfully operate at Sioux City, a large packing plant to be operated at a large profit, etc. (11, 12). This can be disposed of by merely saying that if it be assumed this is a charge that this was done it is no crime to make representations to create such confidence and that the court eliminated everything connected with representations as to profits (453).

The same disposition can rightly be made of the charge that these salesmen were to sell on promise and representation as to what profit would accrue (446).

The next allegation is it was intended that these salesmen and agents would pretend to the victims that defendants were experienced manufacturers of meat products and well qualified to operate economically and at a large profit a packing plant in Sioux City, which would result in large profits to the buyers (R., 11, 12). Of this there is no evidence.

If we assume that such representation is charged to have been made, and that it was made, still there is not a *scintilla* that that representation was untrue, to say nothing of being known to be untrue when made. And the large profit part has been eliminated by the trial court, by the instructions (R., 446).

The next charge is defendants intended that the stock would be sold to the victims on promise and representation that it would pay 7 per cent interest or dividend, the interest or dividend would increase until it would amount to 40 per cent of the subscription, that the said income would pay the 6 per cent interest on the notes given on the subscription, that the victims would not be called on to pay the notes so obtained because the increase in the value of the stock and the dividends would be sufficient to take up the notes (12). As said, the representation as to profit was eliminated. So was everything connected with the "fake" dividend (R., 449).

The last of it is, it would be represented that at any time the victims were dissatisfied with their purchase the same would be resold by the "corporation" and that the said salesmen and agents, without loss to the victims, "and that the notes so to be obtained to be taken up and surrendered to them and the victims would not be required to pay same to the corporation" (12).

We have been unable to find any evidence that such a representation was made and, therefore, any evidence that it was planned to have it made.

And the court refused request 1—M:

"There are allegations that defendant intended that Taylor and his employees did represent the stock would soon be as high as 40 per cent per annum. There is no evidence that defendant so represented or authorized anyone so to represent or any that such representation was being made" (436, 437, 439).

*Charge of Falsely Pretending that Treasury Stock was
Being Sold.*

Speaking to the reselling of stock bought without intention to pay for same, and as to which colorable subscriptions were induced, it is charged:

“That the stock so to be resold under this said arrangement and scheme was to be and was * * * represented by the defendants to be treasury stock of the said corporation” (13).

Ground 27 Motion to Direct (426) urges there is no evidence that any one represented truthfully or falsely that treasury stock was being sold.

All there is on the point is:

“Q. Did you understand you was buying treasury stock of the Midland Packing Company?

“Counsel for Defendant: Your Honor sustained that objection as to this precise question. It is objected to as calling for a conclusion and immaterial and not binding on any of these defendants.

“Court: Objection overruled in the light of what the writing says:

“A. So far as I knew I thought I was buying the treasury stock.

“Defendants move to strike answer as incompetent, and a pure conclusion instead of a statement of facts.”—Overruled (Welden, 294).

XVIII.

As to the claim that it was for the jury whether defendant had caused the mailing of the Count 7 letter. See post.

This is fully argued in dealing with the claim of estoppel. It suffices to say at this point:

a. There is no evidence of causing mailing addressed to said letter. It is not addressed to any count as such.

b. It consists of testimony exhibiting the method of handling and getting out all mail.

c. The opinion of stenographers who did this handling that defendant gave directions generally to the office help (R., 253)—but these stenographers do not show that (if material) was at the time the letter in Count 7 was written.

d. That said letter was delivered by mail—received over objection that it was irrelevant to the allegations of the indictment—and Count 7 has no allegation of delivery, (and see Point VIII)

XIX.

The charge that the letter exhibited in count 7 is a false and fraudulent one, which it was not intended to keep and which the writer knew could not be performed—is not well pleaded, and has no evidence to sustain it.

The indictment charges that the promise exhibited in the conviction count was made with intention not to keep it and with knowledge that it could not and would not be performed. There was no evidence to sustain this except the introduction of the promise itself, and surely a charge of a fraudulent promise is not sustained by a promise which is honest on its face and which it is possible to perform (3, 15).

An allegation that an act innocent in itself but criminal if done "fraudulently" was performed fraudulently, or with an intent to defraud, without the averment of any acts or facts tending to show fraud, is a legal conclusion and futile. It is insufficient to charge the offense of fraudulently taking away or removing a record or document under Section 5408 Rev. St. (U. S. Comp. St. 1901, 3658).

Martin v. U. S., 168 Fed. 199.

In view of these well-established principles, the allegations of the indictment are deemed insufficient to affirmatively declare an intention to defraud, and it is therefore considered that it does not sufficiently either negative the honesty of the pretenses of the defendant, or the intention to perform what was promised, and the motion to quash must be granted, and the demurrer sustained.—*White v. U. S.*, 113 Fed. 855.

In *Milby v. U. S.*, 109 Fed. 638, the defendant mailed a letter which the court says "contains simply a clear proposition to sell the addressee counterfeit money at the rate of five dollars for one dollar. It is held that in the absence of a charge that defendant did not intend to and did not send such counterfeit money on receipt of

the price therefor, the indictment does not charge a violation of the misuse of the mails statute and that while it does propose a violation of another law it does not disclose an intent to defraud the addressee. In other words, the intent must involve misrepresentation, falsity, or some false promise.

To illustrate. The court holds:

There is no averment to the effect that the defendant was not engaged in making counterfeit money and in every way prepared to comply with his proposition if accepted (643).

In the case of *United States v. Etheredge*, 140 Fed. at 379, it was argued the indictment showed a scheme whereby defendant intended to and did represent he had money to lend and would lend at three per cent interest without security, when in fact he had not the money, nor intent to lend it, but intended to obtain the notes of those who would deal with him and make and pretend to make them and demand and obtain in the name of a pretended assignee the amount of the notes—thereby defrauding those who dealt with him.

The court says:

“It might be supposed that such was the scheme, reasoning from what followed, as stated in the description of the acts of the defendant and his co-respondents. But no such facts are alleged as constituting the scheme. It does not even appear that the defendant did not have the money and intent to loan it at three per cent, on a plain note. * * * The indictment would

still be defective in not alleging that the defendant did not intend to lend the money as indicated by the circular (379, 380).

See Ground 14, Demurrer (63, 66).

19a.

Passing that—is there any evidence to sustain this charge?

Of course, the first question is what promise does the letter make.

The promise exhibited in count 7 is not that the writer will perform any promise that Spellings and Colby may have made to Christensen. If defendant be liable it is on the promise *he* makes. He might have promised much more, but all he did promise was that the note would not be sold nor used as collateral; and the inquiry on whether there was a false and fraudulent promise as is charged is limited to the said only promise found in that letter.

It is true that Exhibit 336 dealt with an agreement by Spellings and Colby to resell one thousand shares of stock to which Christensen had subscribed. But it is not in the record that Exhibit 336 was “in confirmation of such agreement,” nor of an agreement to share the profits between Christensen and Colby and Spellings (14). The record is that the agreement was not confirmed, but that the letter in question said the writer had been advised of the promises Colby and Spellings had made—just that and no more—and the promise of the writer is that the note Christensen would give would not be sold or pledged during its

life. Counsel for some reason adds at this point that a year later Christensen signed another subscription for one thousand shares and this time did this at defendant's office in Sioux City, and at the same time made an agreement for resale, profits to be divided between himself and Colby. All that Salinger seems to have done is "made out the papers, note and the contracts," (14, 15). Just what this has to do with the transaction a year earlier as to which Salinger wrote that Christensen's note would not be sold or pledged is not indicated.

19b.

But if it were held that because defendant wrote that Spellings and Colby had advised him of a sale of stock to Christensen and "of their promises made to you in connection with its resale," and that the company thoroughly understands the promises made by these two to Christensen, he made their promises his own it would still be a question what those promises were. It would seem the Government may hardly contend that the promises of Spellings and Colby were fraudulent. It made them its witnesses and thus vouched for their credibility, and they said that they never made a false or fraudulent promise, never made one except in good faith and with full intention to perform; and that if there was no performance in some given case it was because before the time which they had wherein to perform the act of the others, say like Bevington, made performance impossible. (152, 153, 155).

Passing that, Christensen testified on this transaction of resale exhibited in count 7, that Colby and he had some talk about that and that a contract was then made with reference to resale of the stock (280); that Colby and Spellings wanted to sell him the stock for \$100 a share and give a resale contract; that he told them he did not rely on their contract for those large blocks, that he wouldn't do it unless he had some contract or assurance from the Midland or somebody that had authority to give such a contract; that finally he did make a contract of resale with Colby and Spellings.

All else that appears is that this agreement to resell provided when it should become effective and when completed; that the resale was to be at not less than \$150 a share; that the contract is mutually entered into for mutual profit, and that all profits are to be divided, half to Christensen and half to Colby and Spellings (283).

If then it be assumed for the sake of argument that defendant made the promise and representations that Colby and Spellings did, he made no promise or representation that was false, much less one that he at the time of making knew to be false, and our challenge to point to any such evidence is not answered in the opposing brief.

19c.

Recurring now to the main question.

There can be no claim that to the introduction of the promise itself there was added one word of testimony

from which a jury could rightfully infer that the promise made in that one letter was of the fraudulent character charged.

Surely the allegation that the promise was one that was false and fraudulent, which it was not intended to keep and which it was impossible to perform, is not self-proving. And surely if it be assumed that proof of making the promise is evidence of pre-arrangement to make it, still it will not suffice merely to show in support of such a charge that "a" promise was made.

The cases just cited on what it is necessary to plead demonstrate the obvious proposition that there must be some evidence that the promise was such as is charged. And see *Stewart v. U. S. (C. C. A.)*, 300 Fed., at 778.

19d.

There is not a word to sustain the charge unless it be so-called intent evidence.

This intent evidence consists of twelve instances of transactions which in various ways present the making of a resale and profit-sharing agreement, some with and some without approval on part of the defendant (pp. 112 to 120, Orig. Arg.). Without an exception, the record is silent on whether the right to have performance ever accrued and on whether any promise made was or was not kept.

A good faith promise throws no light on whether a similar promise was made with fraudulent intent.

Harrison v. U. S. (C. C. A.) 200 Fed. at 670, 674.

In a prosecution for using the mails to defraud by means of misrepresentations it is proper to receive evidence duly safeguarded by instruction, that though defendants later and more than three years prior to the indictment abandoned land involved and substituted other land *which they also fraudulently misrepresented*.

Riddell v. U. S. (C. C. A.), 244 Fed. at 696.

One who seeks to attach a fraudulent character to other and similar acts may not do this by mingling innocent and lawful and indifferent facts, but must show the other acts were done with a fraudulent intent and for a fraudulent purpose.

Foster v. McAlester (C. C. A.), 114 Fed. 145, 152.

All that is held on this point in Seimer v. Mortg. Co. (C. C. A.) 209 Fed. at 657, is that, where the fraudulent intent of a party in the performance of an act is in issue, proof of other fraudulent acts is relevant, on intent and motive in the performance of the act in question, if there be connection between the other acts and the act in question.

19c.

It was not necessary for defendant to show that he kept his promise. But the circumstantial evidence rather powerfully indicates that he did.

A million dollars worth of notes was turned over to the receiver (415, 416); not a word is said to exclude the Christensen notes from these notes. These notes

were for the large sum of \$100,000 (261). It is undisputed Christensen had "fairly good means under the conditions at that time"; had about one thousand acres of land (287). It is beyond belief that if those notes had been sold or pledged as collateral that the holder would not for his own protection have advised Christensen so that he might not make payment of the principal or interest to the original payee. Christensen as a witness said nothing as to having ever received any such advice. It is inconceivable that if Christensen had been able to say he had received such advice that he would not have been interrogated by the government on that point. He testifies he paid something over \$900.00 in interest and paid that "into the company" (287). It may be explainable why the Midland would be thus easy on the collection of interest. Much more difficult to believe that the holder by transfer of \$100,000.00 worth of notes would remain silent though he received no interest whatever on so large a sum.

And there is the presumption that business transactions are honest.

"The law presumes in the absence of evidence to the contrary, that the business transactions of every man are done in good faith and for an honest purpose; and any one who alleges that such acts are done in bad faith, or for a dishonest and fraudulent purpose, takes upon himself the business of showing the same."

Jones v. Simpson, 116 U. S., 609, 615.

And see *Kessler v. Ensley* (C. C. A.), 149 Fed., 130, 137. And request 13 (432).

It is obvious that no light on the intent as to which the letter exhibited in count 7 was written, was furnished. It does not show a fraudulent intent to show similar transactions that are also not shown to involve any fraudulent intent.

There was an attempt to clarify the application of evidence of this nature. The court was requested to charge (3a-430) that a large number of letters had been received and on the theory that in themselves or when later connected they might bear on the intent with which defendants acted, but that conviction can rest on no letter except one set forth in the indictment; that whatever else such testimony may effect, conviction could be had only on showing beyond reasonable doubt the devising a scheme with intent to defraud and the causing some letter set forth in the indictment to be mailed in aid of that scheme. It was refused.

If it should be said that even if no false promise is proved, it suffices if a false representation, known to be that, was made to Christensen—we answer there never was but one representation made by defendant to Christensen (Count 1). That it was made a year after the Count 7 transaction, and that it was not false and of course not known to be.

It is found in the letter exhibited in Count 1, and is dated March 31, 1920. It states the company is not now in the hands of a receiver and has not been. It adds the opinion and conclusion that "there is no possibility of it so being."

Next, it is said there has been no sale to Swift & Company and no such move is in contemplation. The records says nothing on this.

Next—that the attitude taken in connection with the killing for the past ten days has been based on “our” judgment that no profits could be made by so doing; that it is unfortunate that “we” are compelled to follow “our” judgment in these matters rather than listen to the idle gossip of people who do not have any money invested.

Next—the financial condition of the Midland has never been in as favorable a condition as it now is, and that the warm personal regard which the writer has for Christensen would prompt the writer to advise Christensen if the writer felt the slightest cause for alarm.

He is sure that if the people who gave the rumor would take as much time to investigate as they do to believe they would find it comes from the mouths of people whose judgment, either financially or on a business question, is of no value and that any statements made are of such a character that they are only made with a view of hurting “us,” and, as said before, without reference to how it may seem to outsiders “we” shall be compelled to conduct the business of the plant along the lines which “we” conceive will make the most profit to stockholders, and whether it pleases or displeases those who have no interest; “we” do not expect to conduct the business when there are no profits to be gained.

The writer would be glad to see Christensen personally at any time at the plant and go over matters fully with him (17, 18).

The first statement of facts as to being in the hands of the receiver is true. There was no receiver on March 31, 1920. One was named May 7th (103).

The statement that there is no possibility of a receiver is obviously, at worst, a piece of optimism, and the indictment nowhere in any form charges the making of such statement, either as a representation or in any other way. The possibility of a receivership being misrepresented is absolutely not to be found in any allegation.

The Sparks case, 214 Fed., at 792, in reversing, declares it proper that the full actual value of the bank's assets at the time of its failure and during the period covered by the alleged fraudulent scheme be permitted to be shown. And so, in considering the statement as to receivership and not feeling alarm, there should be considered the refusal of the court to let Stokes say whether the corporation was not in fact solvent on the very day it was turned over to the receiver (R., 188).

The statement of fact that there had been no sale to Swift & Company, and that no such sale is in contemplation, is not shown to be untrue. In fact, it appears no such sale was ever talked over or made.

The statement about what the writer would do if he felt the slightest alarm is another way of saying he did not feel alarm. It is in the same class with the statement that there was no possibility of a receivership. It is not shown that it was false at the time when made; that at that time the writer did feel any cause for alarm. And the indictment does not cover a misrepresentation as to such feeling.

XX.

There is no evidence sustaining the scheme submitted to the jury.

That scheme is this:

Defendants entered into pretended agreements purporting to show that the pretended purchasers were to pay par to the corporation.

It was the intent and purpose of defendants thereby to make it appear that these large blocks had been sold to these dummies.

To pay themselves, through Baine and Taylor, large commissions out of the funds and property of the corporation on these pretended sales, which were on agreement that nothing was to be paid and that the subscribers would receive a small amount of stock for signing.

It was the object of defendants that the dummy stock would be resold at \$125 or more a share, and that all proceeds above par received for such sale were to be divided among and be appropriated to the personal use of defendants instead of the Midland.

They intended to and did subscribe for large blocks at par, with intention not to pay for same.

They intended to buy stock with that intention, with further intention of reselling the stock above par, to victims, and to appropriate the excess above par (R., 453, 454).

It is obvious that the alleged scheme had three main prongs, (a) to get commissions through Baine and

Taylor and by means of dummy stock sales—of this there is no evidence whatever except that Taylor testifies no commissions were obtained by him, and that he knew of no dummy sale (R., 132)—(b) to buy stock with intention not to pay for it with further intention to resell it at a profit to victims—and (c) intention that the dummy stock should be resold above par, and to appropriate the proceeds to their own use instead of that of the corporation.

20a

There was no evidence to sustain the allegation that defendant had obtained "any dummy subscription."

Defendant took this exception:

There is no substantial evidence that the defendant Salinger ever had anything to do with any dummy subscriptions, and that the only support to that charge is the testimony of the witness Krebs who says that he advised with Salinger, without even telling us what Salinger advised him to do, and for aught that appears he may have told him not to do it (469).

The testimony is just what this says it is.

If there be any evidence to sustain this charge it must be found in the testimony of Krebs. It is the fact that his was a subscription so large that he could not have believed he could pay for same. But as a witness for the Government he said he did not recall the circumstances under which the subscriptions were given beyond knowing that it was made "as an expedient at the time" (163).

The next was a statement that he never discussed the financial condition of the Midland with defendants. The Government was then permitted to cross-examine him by the question:

“Although you were officing there with them?”
(166.)

Next, the court said witness had identified a subscription something like a million dollars’ worth of stock and asked:

“How did you come to make that subscription?” The witness answered: “I don’t believe it is that much.” To which the court responded: “Pretty nearly, how did you come to make it?” Then the witness said:

“I don’t understand it. As I indicated a while ago I can designate it in no other way than as expedient. One thing I do recall is this: it became somewhat apparent at the time there might be some difficulty in being able to make sales in territories unless it was possibly privately owned. That might have been the way to account for it. I don’t know anything more tangible than that.

Court: “Who put you up to it? Who did you talk to about it?”

A. “The matter as I said a while ago I don’t recall the exact person.”

Court: “You remember something more about it, don’t you?”

A. “Seven years is quite a time.”

Court: “A million dollars’ worth of stock is quite a lot of stock, too, you can go off and think

it over for a while. Let this witness be held here for a while. I don't understand his testimony at all." (166.)

On this hint the witness reappeared and said he had refreshed his recollection and this occurred:

Q. "Now will you state to the court your best recollection as to the parties with whom you talked at the time that you made the subscription?"

A. "I discusseed with Mr. Salinger the advisability of the thing and as I said before, it was also generally discussed in the headquarters of the company."

Q. "Do you recall whether or not it was discussed generally by the officers of the company prior to the time that you signed those subscription contracts?"

A. "I couldn't say as to that."

"The only one then whom you recall now having gone to was Mr. Salinger; is that right?"

A. "Yes sir." (167).

The analysis of this on part of counsel is that "Krebs somewhat reluctantly" admitted that he discussed with Mr. Salinger "the advisability of the thing"; and that the only one he recalled discussing it with was Mr. Salinger (12). Counsel confuses "reluctant admission" with almost downright threatening to compel the witness for the government to say at least as much as is above set forth (R., 166, 167). And, no doubt because there was so much work to do, his brief contents itself with saying that Krebs did not remember discussing it with any but Mr. Salinger, forgetting to add the witness

also said, "it was also generally discussed in the headquarters of the company" (167). And a la "chops and tomato sauce," one main argument is that Krebs testifies that "Mr. Salinger was in the same office," and one in which Krebs had a desk at the time of his subscribing.

At all events, it cannot well be claimed there is any evidence that in dealing with Krebs defendant intended to resell the subscriptions for Krebs above par and to appropriate what was received above par (Request 27, page 435; Request 29, 435)—or that there is evidence of any agreement with Krebs to meet the charge that a colorable subscription was taken with arrangement that the buyer need not pay, and instead was to receive a small quantity of stock for signing subscriptions.

The matter is fully presented in Ground 4, Motion to Strike (400); and in Request 29 (435).

What foundation counsel finds in the record for the statement on page 13 of the brief that "knowledge of such transaction (Sawyers' getting dummy subscriptions) was traced directly to Salinger," is beyond us. There is nothing that sustains this assertion unless it be what immediately follows the assertion, which is this: Taylor, the sales manager, testifies to conversations with Salinger as to the approval of resales. Just how that traces the dummy subscription work of Burlingame and Sawyer home to Salinger is not revealed. Next follows that Exhibit 506 was put in evidence. In this defendant tells Taylor to have Mrs. Palmer "make the usual report" and give it to Mrs.

Van Riper as soon as possible within the week, because if it is not done there will be delay in the issuance of the stock (13, 14). This applies, obviously, to subscriptions received in the ordinary course. There is not a suggestion in the letter that it deals with any subscriptions obtained by Sawyer and Burlingame, and being addressed to the sales manager and speaking of his bookkeeper obviously means the ordinary subscriptions gotten by the stock salesmen. And it can have no reference to any conversion of the premium or profit fund, because when that was turned in it was, as Taylor says, for distribution to the owner of the stock and the salesmen who had made a resale (R., 131, 132). There could be no issuance of stock upon it and therefore no delay in issuing stock. Obviously, it brings no dummy subscription work of Sawyer and Burlingame home to defendant.

20b.

After all, the accusation is not that dummy subscriptions were got. That of itself could do no harm. The vitals is getting them for the sake of commissions.

Whatever else may be claimed there is no competent evidence to sustain that defendant got a colorable subscription whereby to obtain commission from the Midland through Baine and Taylor. And the court disregarded a request to charge that as to the so-called dummy subscriptions there was no evidence that anyone ever obtained a dollar in commission on them—Request 29, 30 (pp. 435, 436).

The court refused to charge there is no evidence to sustain the allegation that defendant contracted with pretended subscribers who lacked the ability to pay for large blocks of stock and did this for the purpose of using these subscriptions to obtain large commissions through Baine and Taylor. The only support of this accusation is the testimony of Taylor that he got no commission on any stock to Krebs; that while he knew about those large subscriptions including Krebs, afterwards, by seeing them on some notation, he did not know of them at the time (132).

The other testimony in support is that given by Tripp in presenting summaries of the Midland's books (books that were received without sufficient foundation). Most of this testimony is irrelevant to the case of defendant. Part of it is that the books showed the corporation received \$663,750 cash on the Martin subscription (which Burlingame alone was connected with). As to the Krebs matter, Tripp said that under a heading "bank deposits" and a heading "cash" appear the figures \$237,500 which, according to the books, showed that the account of Taylor commissions was charged with that amount as a result of the Krebs subscription. This all is objected to among others that it lacked foundation and is hearsay (327). Most of it is utterly unintelligible; and outside of this forced interpretation of the witness Tripp the books present nothing tending to show that any \$237,500 commission on the Krebs transaction ever existed or was received by anyone. (See, for example, pp. 137 original argument, pp. 125, 126, 218.)

Nor was there evidence that defendant bought any stock with intent not to pay for it (Request 27, 28, page 435).

For example—over apt objection the court received testimony that there was an entry showing receipt from defendant in \$1,462.50, which witness said would indicate that this amount was to be credited to a note of his (236). And Tripp speaks on payments shown by the books. And the court said to this witness that this matter was an important one (R., 361).

As to the Christensen transaction upon which alone a conviction was had, there was a failure of evidence to support the allegation that defendants devised to obtain subscriptions from "dummies." It is without dispute that Christensen was a good faith subscriber and a man of ample means to honor any obligation to pay for what stock he bought (456, 287).

XXI.

THE CHARGE OF CONVERSION IS NOT SUSTAINED.

There is no evidence of a scheme to convert any thing from the Midland. The conversion asserted by the indictment is of profit obtained in resale agreements. This could not be converted from the Midland

because it is the undisputed testimony that the profit-sharing agreements were something the salesmen did "on his own hook so to speak" and no one but the salesman and the purchasers would profit by that agreement" (131, 132, 145, 146, 214, 288, 289, 290, 314, 315, 316, 373, 386, 387).

The court took the position that because in some instances defendant approved the resale contracts this somehow placed title to the profits on the resale in the Midland (145, 155). All that the approval matter comes to is that it would restrain from making resale agreements of such nature as to injure the selling of stock which the corporation desired and needed to have sold.

The undisputed evidence is the resales and the approvals were honest and the court should have so instructed (150, 153, 427, 433, 434, 435).

But passing the question of honesty in approval. Whether the act of approval was honest or dishonest, it gave the Midland no title or interest in a fund which belonged to the owner of stock and the one with whom he contracted to have stock resold at a profit.

And if there had been an intent to convert a profit on the Christensen resale, some effort to press that sale would have been in the record.

The attack is in requests 24 and 25 (434).

21a

Passing the lack of title—the system of proof was testimony that the Taylor office transmitted Taylor checks and certificates of deposit, to "the Midland

office" or to one Van Riper; that these Taylor checks were charged to Taylor's bank account, and that items corresponding in amount and time to what the Taylor office had transmitted were credits in the bank account of defendant.

The court charged there was some evidence that some of these checks transmitted by Bolich corresponded in amount with deposits shown by records of different banks to have been credited to the defendant in that bank--and that this goes to show, that at least as to defendant Salinger that he received some part of these moneys (463, 464).

It approved the method of tracing by a statement that witnesses had traced some of this premium money out of the Taylor Company into and then out of the Midland, at least to the account of Salinger, and that there was some evidence of identity.

One exception that was urged is this:

"The court should have charged there is no evidence as to identity of amount or anything else concerning deposits made by defendant which furnishes any evidence that he converted any part of said fund, and that the naked fact that Taylor gave defendant checks does not prove that, so, defendant obtained any of the fund--especially as the evidence shows Taylor could draw no checks on that fund" (469).

There is no competent evidence that any item in the bank account of defendant had the endorsement of the Midland.

What does it matter if it had been competently shown that defendant was the last endorser on some check issued by Taylor, even if a deposit in the same amount as that check was made in the bank account of defendant. We are not concerned with any Taylor check except those that were sent by Bolich to the Midland. The undisputed testimony is that these were sent for something "due them," the Midland (R., 176, 186). What was sent was the balance after deducting the Taylor commission (R., 131). Nothing due the Midland could be paid it by a check issued by Taylor unless the check was either made payable to the Midland or endorsed to it. So of certificates of deposit transmitted. So the question is not what endorsing defendant did, but what endorsing the Midland did. Similarity in amount or time or both is of no consequence without evidence of such endorsement. No credit was given to defendant's account for any item in which the title appears ever to have been in the Midland, without its endorsement.

In *Naftzger v. U. S.* (C. C. A.), 200 Fed., 494, it is held that courts will take judicial notice that it is unusual to buy stamps elsewhere than at a post office except in small sums; that stamps are not used as exchange, that "postage due" stamps have no money value and may not regularly be in the possession of anyone but postal officials—and that banks, railway and insurance companies, mail order houses and other concerns buy and have on hand many thousands of dollars in postage stamps. Surely it is as much matter for judicial notice that a bank would not credit a

check or certificate of deposit payable to the Midland Corporation without endorsement by it. In other words, similarity in amount effects nothing in the absence of evidence that the item deposited had not only the endorsement of defendant but as well that of the Midland.

In the brief for the Government there is set forth an enumeration covering three deposits to the credit of defendant's bank account, four items out of twenty-nine transmissions made by Bolich. These items are, respectively, \$4,537.50, \$2,525, \$1,137.50 and \$1,937.50 (17, 18). They stand as to what was transmitted by Bolich in the proportion of four out of twenty-nine, and amount to a very insignificant sum when compared with the amount transmitted by Bolich. There is no evidence that if these were taken it was a tortious taking. It is not made to appear that the Midland Corporation did not consent and it would be no extraordinary thing to permit this comparatively small amount to be used by a vice president.

21c.

The court treated transmission to Van Riper as one made to defendant. There is nothing in the evidence that makes any act by Van Riper the act of defendant even if *respondet superior* be held, for the sake of the argument, to apply on the criminal side. (See pp. 181, 182, original argument.)

There is no evidence giving Van Riper a status which made her actions those of defendant, even on

the civil side. There is no foundation for the assertion of the Government that Van Riper was the secretary of defendant (15) (if that matters). Van Riper was a stenographer, not even shown to be that for defendant (R., 249). And she was assistant secretary, i. e., assistant to Secretary Burlingame (R., 181).

To make defendant responsible for Van Riper results in two non permissable things. It constitutes a variance because the indictment accuses defendant and not Van Riper. It makes a conviction of either of two possible on what either did, and without agency or charge of conspiracy.

In the charge to the jury the trial court said it was not necessary that all things specified in the indictments as constituting the fraudulent scheme should be proved. It then grouped the fraudulent representations charged in the indictments into five paragraphs, connected disjunctively and said:

“Either of these, if proven, is sufficient to constitute the fraudulent scheme charged in either of the indictments.”

This was error. A vital element of the scheme was omitted from all but one of the paragraphs, namely, the purpose to sell the shares of stock to those to whom the representations might be made, and thereby defraud them. This purpose was expressly charged in the indictments, and necessarily so, because without it there was no scheme to defraud. *Blackman v. U. S.* 186 Fed., 965.

21d

So far, the testimony addressed to conversion has been treated as proper in form and competent. It does not have either of these attributes. It consists of permitting witnesses to say what books show instead of limiting evidence of that to what the books themselves say; of various (R., 173, 179, 186, 187, 188, 189, 190, 191, 192, 194, 195, 197) and nonpermissible interpretations; of copies of ledger sheets put in despite their being secondary evidence without proper foundation (R., 191, 199, 203, 204, 213, 214, 218, 219, 296, 383, 395); receiving such evidence on the testimony of witnesses who in one instance was not even an employee of the institution possessing the books at the time entries are said to have been made; his testimony and that of others declared that witness did not make the entries and could not vouch for the correctness or authenticity of any entry and spoke only from what they were pleased to term "the records," an interpretation that words and figures on a paper indicated who was the last endorser (R., 195, 204).

21e.

Tripp was permitted to address himself to the issue of conversion by testimony as to what books failed to show, under due exception (R., 401, 470).

It is without conflict in authority that such evidence is incompetent even if based on properly authenticated books. (See original argument, pp, 213 to 217.)

The Court took the position that somebody converted money from the Midland because the books made no showing that this money had become the property of the Midland.

"Books of account are never evidence of a negative character to rebut a presumption by showing that there is nothing upon them in reference to the claim set up by the adverse party; they are evidence only in regard to matters offered of debit or credit which positively appear upon them. — *Mattocks v. Lyman*, 18 Vt., 98."

"A party's books are not ordinarily admissible to establish a negative in his favor by showing the absence of affirmative entries. — *Kerns v. McKeen*, 76 Calif., 87; 18 Pac., 122."

"Mercantile books can only be admitted as affirmative evidence and are never admissible to establish a negative proposition. In this case the books of a partnership were held to be inadmissible to show that they contained no entry showing that the defendant had delivered tobacco to the firm as claimed by him as a defense. — *Lawhorn v. Carter*, 11 Bush, 7."

"A book of account is inadmissible to prove, from the absence of an entry therein, that certain money was not paid. — *Riley v. Boehm*, (Mass.), 45 N. E., 84."

See also *Kerns v. McKeen* (Calif.), 18 Pac., 122, and see pp. 213 to 217, Original Argument.

There is no foundation for the banker evidence.

One witness, Nelson, says he does not believe he was connected with the bank at the material times involved (201, 202, 203). In the brief for the Government (16), his testimony is relied on to authenticate the "records" of his bank between June 15, 1919, and January 20, 1920. He testified that he did not become connected with the bank until September, 1919, and that the entries for four months were made before he entered the employ of the bank. That on all of the sheets there were only four items, possibly six, in 1920, and they were made by some one after he entered the bank's employ. Said brief (16) refers to deposit slips accompanying Salinger's deposit; Nelson's testimony is to the effect that the deposit slips were not in handwriting of Salinger.

The record shows as foundation for the bank evidence nothing whatever that can constitute that foundation. It is filled with statements that witness did not make a single item or single record shown on any exhibit spoken to by him (209); does not even know who it was that made such "record" (209); does not know of his own knowledge whether a single item is true or correct (209); is not testifying from memory but from records which he did not make and as to which he has no personal knowledge whether it is true or not, and that he only knows "from the record that is here" (207).

One who was vice-president at the time of testifying, and before had been cashier, said his bank had a head

bookkeeper who was in charge of keeping the books, that items coming into or going out of the bank were usually first handled by the tellers, that the first evidence was a deposit or credit slip, that this was reflected on the teller's sheet which witness handed over to the bookkeeper, and then the head bookkeeper handed it over to the various bookkeepers, and "that they were made up" (217). The same witness said that of his personal knowledge he did not know whether one of the entries was accurate or correct or not, and that this is true as to every exhibit to which his attention had been called (220, 221, 222).

Nelson said he knew nothing of the usages in his bank except as the custom and usage was reflected by the books of such (202).

He testifies that there were no bank records other than a customer's ledger, a deposit slip and the remittance sheet (198). And that Exhibit 243 is a ledger sheet, was made by machine and is not in the handwriting of anyone and it is impossible for him to say by whom the entries were made (201).

He would not say he had not made any of the entries or had no connection with any of them because they had six people in his bank, "and I probably have taken some part in it" (198).

But he says he could not point to any entry in Exhibit 260 that he made personally, nor point out on Exhibit 243 a single item or items that he made or recorded; and unless he had the deposit slip he could not tell the name of any employee of his bank who recorded an item shown on Exhibit 243 (199). Says he

does not believe that he personally handled the items in Exhibits 258 and 259 (199).

About the best Nelson would finally do was to say he knew the "records" were correct "because our records must be correct." On hearing this the court inquired: "That is, they must all correspond in order to make up the balances. If they were wrong they would not do that, is that what you mean?" to which the witness answered: "That is it" (198).

The case is not brought within a line of decision which attempts some sort of an exception to the hearsay rule because one is one of the parties to the suit—employed 4,500 men and it would be very difficult to have made a witness of those. For all that appears here is that these banks employed very few men and Nelson said he did not think that more than one person made entries "on this sheet on each day's business" (201).

There was plenary attack on the bank evidence by objection and by motion. (See pp. 263, 264, original argument).

It should be said in this connection that the court unduly curtailed attempts to show by cross-examination that the so-called records were not worthy of much credence. For example, after Lyon had said that one exhibit produced by him was a permanent record, though it consisted of lead pencil notations, the court would not permit him to be questioned whether or not all the permanent records of his bank were made in that manner (222).

The Worden case, 204 Fed., distinguishes *Bacon v.*

U. S. (C. C. A.), 97 Fed., 35, in favor of the case of Bacon, which was prosecution of a president for making a false report of the condition of a bank, and where the books were let in not only because defendant was the chief executive officer, but also because the law fixed severe penalties for not keeping the books truthfully, thus justifying the presumption they had been so kept. But even under Bacon's case, if the bank evidence had consisted of the books of the bank (and it consisted of copies of ledger sheets only), it was error to receive them because of lack of any competent foundation. *Chaffee v. U. S.*, 85 U. S., at 530; *Phillips v. U. S.* (C. C. A.), 201 Fed., at 283, 284, 285, 286, 289; *Worden v. U. S.* (C. C. A.), 204 Fed., at 7, 8, 10; *Chicago Lumber Company v. Hewitt* (C. C. A.), 64 Fed., 314, 319. (See page 255, original argument.) As to the Bacon decision see *Phillips v. U. S.* (C. C. A.), 201 Fed., 269. And *Ammerman v. U. S.* (C. C. A.), 267 Fed., 136, in the first of which it was held that such presumption of correct bookkeeping would not suffice.

In *U. S. v. Phillips* (C. C. A.), 201 Fed., 260, 263, 264, 265, 269, Circuit Court of Appeals of the Eighth Circuit reversed because bank books having better foundation and authentication than the ones at bar were received. And aside from rejection being due on the merits it was the duty of the trial court to follow the Phillips decision.

A number of "little slips," utterly unintelligible notations made on an adding machine, were received (R., 172, 174, 175). This, through a witness who did

not claim she was speaking from a recollection refreshed by these memoranda or that she had any recollection about them, and who merely indulged in deduction that these notations indicated to her what she had transmitted because in some instances she found her initials upon these slips or notations.

The typical objections were that the notations were not binding on defendants and that no proper foundation had been laid and that they were incompetent, irrelevant and immaterial. (173, 175, 176). And that they were hearsay (173). And there was full attack and there is full assignment here. (See pp. 284, 285 original argument).

In *Stewart v. Morris* (C. C. A.) 89 Fed. 290, the memorandum in question was manifestly imperfect and fragmentary. It is ruled:

Where a witness has not testified that a memorandum made by him is accurate or full, nor that he can not by refreshing his memory from it state the facts, it is error to permit such memorandum to be read to the jury.

Memorandum is only auxiliary and not a substitute for the oral testimony of the witness required to make the writing admissible: *Russell v. Hudson River Co.*, 17 N. Y. 134; *Howard v. McDonough*, 77 N. Y. 593; *Haven v. Wendell*, 11 N. H. 112; *Parsons v. Wilkinson* ("Maxwell's Exrs. v. Wilkinson"); 113 G. S. 656 (28: 1037) and see *Greenburg v. U. S.* (C. C. A.), 145 Fed., 81.

A memorandum is not admissible where the foundation for it is testimony that the maker has no recollection on the point but knows that the matter dealt with in the memorandum occurred because he had so stated

in it and because it was his habit never to sign a statement unless it was true—the memorandum cannot be read in aid of his testimony—*Parsons v. Wilkinson*, 5 Sup. Ct. 691. To make a memorandum admissible the maker must say that it is accurate and full, and that he could not on refreshing his memory from it state the facts—without that it is error to permit such memorandum to be read to the jury—*Stewart v. Morris* (C. C. A.), 89 Fed., 200. The witness must say he has no independent recollection or else that the memorandum refreshes his recollection—*De Witt v. Skinner* (C. C. A.), 232 Fed., 443.

A memorandum taken from the books of accounts of a witness, not claimed to be a copy of the original entries in the books, but merely a summary or addition of the amounts as entered therein, cannot be used to refresh the memory of the witness, nor used in argument to the jury, nor should the jury be allowed to take it with them in their retirement. And instruction to the jury not to consider it as evidence does not cure the error; for, if not evidence, it was improper to let it go before the jury.

Stoudenmire v. Harper (Ala.), 1 So., 857.

And see *Bates v. Preble*, 14 Sup. Ct., 277, and *Weaver v. Bromley* (Mich.), 31 N. W., 839, 277, 395, 459, 460.

There was no pretense that the witness who produced them and says she made them had any personal recollection as to what these notations dealt with; she did not even say they were true memoranda; nor that they could refresh her recollection, or that they did so.

What she did was to deduce that these notations were hers by such statements as that she "takes it from her initials" that these notations are her own (R., 169), and that "the record indicates" that the \$18.75 per share sent to the Midland consisted of certain items of cash and its equivalent (R., 172, 174 and see R., 173, 175, 176, 177). What she says is always to the effect that "this record" indicates that certain things were transmitted (R., 172, 173, 175, 176). In one word, witness is not speaking from recollection nor upon refreshing it but gives her deductions from finding her initials.

XXII

The promise made in the Count 7 letter is irrelevant to the scheme as deleted, if it were a promise not intended to be kept—but we submit we have shown it was not of that character.

Failure to prove the promise to be fraudulent is, in law, the exact equal of showing that the promise is an honest one—and, surely, the promise at bar would not be in furtherance of the alleged scheme to defraud if it were affirmatively shown the promises had been performed. As before said, there is strong circumstantial evidence to that effect. But, for that matter, failure of one who has the burden to show that the promise was broken is for present argument equal to such affirmative showing.

If a letter is merely a request for a loan upon ample security tendered and enclosed it cannot be said to have been mailed in execution of a scheme to defraud

the lender—*Hendrey v. U. S. (C. C. A.)*, 233 Fed., 5—and it is only a promise which it is known is impossible to perform and which there is no intention to perform which may not be mailed and which is relevant to aiding a scheme to defraud—*U. S. v. Comyns*, 248 U. S., 349.

We do not claim that there is failure to prove relevancy because the letter is innocent on its face. What we contend is that there being no more than such letter it can not be contended that it could in reason have been intended to aid the scheme submitted to the jury. For the statute does not make it an offense that "a" letter was mailed. A letter stating that the writer was hoarse would, as matter of law, be no aid to a scheme to obtain money on worthless checks.

Fraudulent schemes are not denounced by Federal law. The gist of the offense is the use of the mails in aid of such schemes. That alone confers jurisdiction upon the Federal courts. It is the *corpus delicti*. *U. S. v. Jones*, 10 Fed., 469; *Lemon v. U. S. (C. C. A.)*, 164 Fed., 957; *Olsen v. U. S. (C. C. A.)*, 287 Fed., 89. And see pages 95 to 101, original argument.

The promise is not to pledge or sell the notes of Christensen. On what theory could such promise aid a scheme to buy stock at par with intention not to pay for it, resell it at profit and to convert that profit? In what way could it aid that scheme no matter how many times defendant promised that a note given on an honest subscription would not be sold or pledged?

What relevancy has the fact that a year after the transaction exhibited in count seven defendant drew the

papers for another resale agreement in which once more the profit was to be divided between Christensen and Colby and Spellings. How does the fact that two profit sharing agreements were made between those parties make the promise in the count seven letter relevant to the scheme which the court submitted to the jury? That scheme is obtaining dummy subscriptions, and no other kind, and for the purpose of getting commission through Baine and Taylor. How could helping a purchase by one who is not a dummy subscriber and agreement on his part to share resale profits with the salesman who made the resale help a scheme to obtain commissions through obtaining dummy subscribers? We were told on oral argument that this letter might have aided this scheme if the half profit which the salesman received was to be divided with defendant. Perhaps that is so. The only difficulty about making the argument effective is that there is not a shadow of testimony for such a theory and that, on the contrary, Taylor, as a witness for the Government, says flatly that no one but the owner of the stock and the one who made the resale had any interest in that profit, and that Spellings and Colby, also witnesses for the Government, say that all they did was open and above board and honest.

Throughout the argument for the Government runs the misconception that there is any complaint in the indictment of any such transaction as the one with Christensen. No complaint is made of anything connected with a resale arrangement between an honest purchaser and those who agreed to resell for him. It absolutely

does not matter what defendant may have done as to the resale arrangement involved in count seven. The only thing in the indictment that is complained of as to resales is found on page 13 of the record and is that defendants planned to and did subscribe for large blocks of stock at par with intention not to pay for it, "and with the intention of reselling such stock for a price or sum in excess of the par value thereof, to victims," and to appropriate and divide all realized above par "in the resale of such stock." In other words, nothing may be done under this indictment concerning the resale of any stock except the stock that defendants themselves bought with alleged intent not to pay for it.

Confused reasoning must result unless firm hold is kept upon one thing, and that is no complaint is made of any ruling holding that any one thing is not supported by the evidence. No assertion is made that the court may not rule that an indictment charging two false pretenses has not been proved as to one of them. The vital complaint is that the court found a method for disregarding the elementary rule that the very scheme alleged must be proved or else an acquittal must be directed, and found a way to limit a jury to considering an indictment which as to the scheme was not the same indictment that the Grand Jury had returned. That scheme had some twelve constituent elements, and it is all of these together and not a part of them that constitutes the description of the scheme returned by the Grand Jury. The court could no more limit the consideration of the jury to a scheme that differed from the one returned by subtraction than it

could have told it to consider the twelve elements plus an additional one. Either taking out one brick of this wall or putting one in, for the purpose of this argument, makes a different wall than the one the builders left.

One attempt in oral argument to point out the relevancy of the letter in count seven was the statement that defendant was a party to a system of reporting to the Midland which somehow concealed \$18.75 a share which remained after deducting the 25 per cent commission on stock sold at \$125 a share; and that he was a party to a system of applying on other subscriptions which in some way was wrong. We are at loss to understand how this, if it were the fact, makes a letter promising an honest purchaser that his note would be neither pledged nor sold relevant to a scheme either to buy stock with intent not to pay for it and resell it at a profit, or a scheme to get dummy subscribers in order to get commission on the subscriptions. But that need not be pressed because the record shows without dispute that the premise is unsound. There is not only no testimony that any report was sent which would tend to promote said concealment but it is the undisputed testimony that it never left the Taylor office (R., 181). The form that is said to work that concealing consists of the adding machine slips or notations. Witness Bolich said to the court on inquiry that one had to look at those slips "to get the other \$18.75" (R., 174). That is to say these slips that never left the Taylor office showed the amount above commissions on a share sold at \$125. What the

witness said was not that she transmitted these slips but that they indicated to her how much in addition to the \$75 note per share she sent to the Midland. It is Taylor who said he thinks that there "would be separate statements for the \$75 payment and a separate statement for the \$18.75" (R., 131). But he says it was Mrs. Bolich who was handling this, and she says that while she made two distinct remittances the adding-machine slip notations were not sent out of the Taylor office at all. To repeat what she does say is that those slips indicate to her how much she sent in addition to the note. She tells what these slips "cover" but not that they were transmitted (R., 172); that the record indicates they cover what was "turned over to the Midland Company for the \$18.75 per share" (R., 173); that the record indicates "As far as I can tell" what was sent down in addition to the \$75 note (R., 173, 175, 177), and that "it was made all in one report, but as I remember it, there were two remittances, one for \$75 a share, in the form of a note usually, and the balance consisted of cash or its equivalent in bonds or certificates, and the second remittance consisted of \$18.75 per share (R., 169).

The premise as to defendant directing application on subscriptions is in no better case. Bolich says this permission to apply was obtained "from the office of the Midland Packing Company," and that her recollection is she received instructions where to apply the notes transmitted from Mrs. Van Riper (R., 171). Later on she says, "I do not know from whom in the

Midland Company office I received instructions as to where to apply the notes transmitted in the letter, Exhibit 236, except as general instructions were from Mrs. Van Riper" (R., 176); and that such instructions "generally came from Mrs. Van Riper" (R., 181).

XXIII.

There was variance as to the allegations of joint offending, and in other respects.

The indictment charges that whatsoever was done was done by the "defendants." The Court construed this to mean a charge of joint offending, for it instructed that the only charge remaining to be considered by the jury is one that what was done "was a part of the plan and promotion joined in and understood by all three of these defendants" (453). But throughout, the trial proceeded as though that were not the charge—as if each defendant was separately indicted for distinct acts done by him only.

The defendant tried, unsuccessfully, to have information on what acts were relied on for the assertion that he and his co-indictees jointly placed or caused to be placed the indictment letters in the mail; or for the charge that they jointly caused the delivery of these letters; or acted jointly in devising the alleged scheme. (Grounds 3, 7-a, 10, 13, motion for bill of particulars, 43, 46, 47, 48). He was advised on the trial for the first time that the basis of the accusation was that he did some obviously individual thing or that his co-indictees did. For example, that he ap-

proved resale agreements—surely that was not a joint act; so of a contract between Baine and Statter (393).

And then there was testimony about defendant writing letters having no reference to either of his co-indictees and without evidence that they in anyway participated. And evidence that these others each wrote individual letters. And the verdict acquitting Sawyer and Burlingame settles conclusively there was no joint action. But nonetheless motion in arrest was overruled.

23a

Though the indictment charged nothing but joint offending, the court instructed that the plea of not guilty put each defendant on his own responsibility, that he could be convicted only by guilt traced to him directly and that it was a matter of personal responsibility. In effect, this turned an indictment charging joint misconduct into one brought against each defendant singly for acts of his own.

Counsel argues that this instruction is a cure of meeting a charge of joint offending with individual action. On the contrary, it is an aggravation. It tells the jury that one charged with joint offending is to be dealt with as if the charge accused of individual conduct.

See grounds 9, 13 and 29, Motion to Direct (423, 424, 426).

What is it but making a greater variance between the indictment and the proof to instruct that the guilt of each was personal and he could not be found guilty

for anything done that could not be traced to him personally, and was not to be found guilty on the conduct for which he was not directly accountable and responsible (R., 438). (Brief, 26.)

By the way, on the theory that there was not a joint accusation and that the evidence need not prove joint action, on just what theory were these fourteen counts put in the same indictment, some of them charging letters written by Sawyer, some by Burlingame, some by the Midland Company, and as it turned out one written by Stokes "on his own."

It is only the representations set forth in the indictment that the jury may consider.

Stewart v. U. S. (C. C. A.), 300 Fed., 177, 178, 179.

The evidence must meet the identical scheme to defraud which the indictment complains of.

Booth v. U. S. (C. C. A.), 139 Fed., 256;

Hendrey v. U. S. (C. C. A.), 233 Fed., 5;

Brown v. U. S. (C. C. A.) 149 Fed., 219. (See pp. 277 to 279, Orig. Arg.)

Where a complaint charges two offenses conjunctively conviction can be sustained only on proof of both offenses.

Templin v. Ala., 48 So., 1027.

The charge is that defendant made representations, the evidence, that the representations were made by others than defendant and for whose conduct he is not responsible.

The verdict acquitting the codefendants settles there was no joint action.

In law, this record exhibits fatal variances, for example:

Where the offense arises wholly from any joint act which in itself is criminal, without regard to any particular personal defendant, the defendants may be either charged jointly or severally. But where the offense charged doth not wholly arise from the joint act of all the defendants, but from such act, joined with some personal and particular defect or omission of each defendant, without which it would be no offense, the indictment must charge them severally, and not jointly.

Commonwealth v. Miller, Parsons Equity Cases, 485.

In *Stephens v. State*, 140 Ohio, 366, the court holds that the indictment charges the commission of a joint offense and did so in proper manner. The court says this was little help because the trial court instructed defendants might be guilty of a joint offense though the indictment but showed that they had been separately guilty of it and did not show that they were together engaged in the same act. The court concludes:

"If this were the law it would be of little use to require an indictment."

And:

"If the proof only showed that they have separately engaged in distinct acts, it by no means supported the indictment and the verdict was wholly without proof to sustain it."

To like effect is *Elliott v. State*, 26 Ala., 78; *Lindsey v. State*, 48 Ala., 169; *Pullen v. State* (Ga.) 42 S. E., 775.

If two are charged jointly with receiving stolen goods, a joint act of receiving must be proved; and proof that one received in the absence of the other, and afterwards delivered to him, will not suffice. Successive receivers are all separate receivers, and all punishable. *Rex v. Messingham*, 1 Moody's Crown Cases, 257.

In *De Luca v. U. S.* (C. C. A.), 298 Fed., 415, it is held that under an indictment charging joint possession participation in the commission of the offense must appear before the jury would be justified in convicting him. And see pp. 143 to 149, original argument.

It was all received over such objections as that it was irrelevant to the indictment, was not binding and had no tendency to prove joint action (117).

Below follow typical examples of fatal variances:

On allegation of a false oath asserting that prosecutrix was eighteen, there cannot be conviction on testimony that the girl was twenty-one.

Knight v. State (Tex.), 158 S. W., 544.

A charge that \$9.00 was obtained by false pretense—the evidence shows it was \$6.00.

Litman v. State, 9 Tex. App., 461.

The proof must sustain the very representation set forth in the indictment.

Regina v. Butcher, 8 Cox. Criminal Cases, 83.

A charge of falsely testifying that prisoner paid M as administrator of an estate a sum of money, and proof that he paid to a man who represented himself to be M administrator, is a fatal variance.

Blevins *v.* State (Ark.), 108 S. W., 394.

In Gammon *v.* U. S., 12 Fed. (2d Ed.), 226, a fatal variance brought about a reversal and the variance was this:

"The offense charged was devising and using the mails to execute a scheme to get the moneys on the mail orders with the intent never to fill them, never to refund the money, never to 'satisfy in any manner or way those customers who had purchased cattle from him by mail.' The offense submitted was devising and executing by the use of the mails a scheme to get the moneys on the mail orders with the intent and hope to use them to continue a business which had been successful from 1908 to 1921, and was still in operation, into which he had put \$2,000 of new money, and to fill, perhaps with some delay, the orders he was taking and those he had taken."

The *means* must be set out in specific manner.

U. S. *v.* Patterson, 55 Fed., 605;

U. S. *v.* Milby, 109 Fed., 643.

And it should not be overlooked that a fatal variance also constitutes a failure to advise of what is to be met at the trial.

XXIV.

The verdicts are inconsistent and also work an estoppel against asserting that the conviction ought to be sustained.

On this record, which presents a conviction on Count Seven only, it appears that for some reason the jury found defendant was not guilty except of the charge in that count. His co-defendants were acquitted on each of the fourteen counts. This makes matters stand as if there had been but one indictment, against this defendant only, and making the charge found in Count Seven. Another way of stating it is that the inquiry is limited to whether this defendant devised the scheme exhibited in Count One, adopted in the others, and whether he by means of false representations, statements, pretenses and promises schemed to obtain the money and property of Christensen in exchange for shares of Midland stock.

He presents that (*a*) the verdict is inconsistent with the acquittal verdicts returned both as to him and as to his co-defendants, and there should be a reversal because of this repugnancy, and (*b*) that the acquittals so determined the issues between him and the Government as that the conviction on Count Seven finds him guilty of what the acquittals found him not guilty—that an estoppel has so been created. We shall seek to show that the plea of inconsistency and of estoppel differ essentially. We shall speak first to the repugnancy. That the findings are inconsistent

is, of course, undeniable. The question is, what should its effect be?

In *Hohenandel v. United States* (C. C. A.), 295 Fed., 489, it is said:

"If the government relies upon the facts charged in the other counts to sustain the verdict of guilty on the seventh count, the judgment cannot stand, for the jury has found as a fact that the company did not commit the acts therein charged and in that case the verdict, as defendant contends, would be inexplicable and inconsistent. Facts that have no legal existence may not support a verdict. The verdict of guilty on the seventh count must be based on evidence other than that pleaded in support of the first six counts" (295 Fed. at 490, 491).

In *Pern v. United States*, 4 Fed. (2nd Series) at 881, the final conclusion is:

"If the government relies on the facts stated in the first four counts to sustain the fifth count, the judgment cannot stand. The verdict as to that count must be supported by evidence other than the facts set out in the first four counts." (Citing *Hohenandel* case).

In *Rosenthal v. U. S.*, 276 Fed., 714, the court says, that while there was ample evidence to sustain the verdict of guilty, "the difficulty is that there was but one transaction involved in the second count"; that this transaction was based upon the same statute, and, "according to the evidence but one transaction between Rosenthal and the thieves"; and the court concludes:

"By its verdict upon the first count the jury found that Rosenthal neither bought nor received the cigarettes from them with knowledge of the theft, and by its verdict upon the second count that he was at the same time and place in possession of the property with such guilty knowledge."

And that the two findings were thus wholly inconsistent and conflicting, and for this reason, the court feels obliged to reverse and remand.

In *Baldini v. U. S.*, 286 Fed., 133, it is held:

A conviction on a count for possessing intoxicating liquor is irregular where all the elements necessary to it were included in another count for manufacturing, on which accused was acquitted.

See *Rouda v. U. S.*, 10 Fed. (2nd Series) at 918.

And see *Morris v. U. S. (C. C. A.)* 7 Fed. (2nd Ed.) 785.

State v. Akers, 278 Mo., 368; 213 S. W., 425, seems merely to hold that where two counts are actually identical in wording, that where there is conviction on one and acquittal on the other, there is in truth no verdict that can be used to either support a plea of acquittal or conviction; and that in such case, all that can be done is to reverse and remand for a new trial.

Defendant could not be punished under each of two counts, one charging the manufacture and possession of intoxicating liquors, and the other the possession of implements and ma-

terials designed for manufacture of such liquor, where the manufacture was the dominant feature of the first count; and though she did not ask that the government be required to elect, she was entitled to be relieved from punishment under the second count, on motions for a new trial and in arrest of judgment assuring double punishment.

Reynolds v. U. S., 280 Fed. at 1.

24a.

It is, of course, the law that each of the counts put into the same indictment has the same standing as though its allegations were made the subject of an independent indictment. The courts that attach no importance to inconsistency or repugnancy of verdicts on an indictment containing more than one count, always assert that that count has the standing of an independent indictment and dispose of the inconsistency by saying that acquittal on one indictment does not entitle to acquittal on another indictment.

Marshall v. U. S. (C. C. A.), 298 Fed., 76, is illustrative. It holds it is permissible for a jury to convict on one count and acquit on another, where it was also within their province to convict on the same evidence in both counts. And *O'Brien v. State (Ga.)*, 95 S. E., 939, which holds that judgment should not be arrested because the offenses charged in the two counts are separate and distinct. To begin with, this line of decisions has the vice of giving importance to inconsistency in no case unless there is no need to urge it.

In other words, according to them, repugnancy may not be complained of unless, under the evidence, there should have been acquittal on all counts. But when that is the state of the evidence the conviction must be set aside on that ground, and inconsistency becomes immaterial.

It seems, however, to be the great weight of authority including Georgia, where the O'Brien case was decided, that where the evidence is the same as to different indictments, there should be appellate interference where there is an apparently arbitrary conviction on one, and acquittal on the other. That is the holding in *Morgan v. De Vine*, 237 U. S. 632; in *Peru v. U. S.* (C. C. A.), 4 Fed. (2nd Ed.) at 881; in *U. S. v. Lee*, 4 Cranch, C. C. 446; *U. S. v. Meiner*, 11 Blatchford, 511; in *Burton v. U. S.*, 202 U. S. 344; in *Ex parte Lange*, 18 Wall. 163; and in *Ex parte Henkes* (C. C. A.), 267 Fed. 276.

It is of course true that the acquittal on one count does not settle that there should have been one as to some other count. But that fact does not touch the true ground for setting a verdict aside for repugnancy. That ground is that when a jury acquits and convicts on the same evidence defendant has not had a true verdict—that his liberty has been submitted to a shake of the dice. Some verdicts are not "rightful"; have "a taint"—*State v. O'Donnell*, 176 Iowa at 345.

24b.

Be all that as it may—the plea of estoppel differs from that of inconsistency in one vital respect. Every

decision that holds there is no inconsistency which defendant may complain of goes "behind the returns," and bases itself on examining the evidence, and upon that finds that defendant received undue mercy—that the verdict should have been consistent by convicting on all the counts. But on estoppel there may be no such inquiry. On the plea of estoppel by judgment, the court can not inquire into whether the evidence warranted such a judgment. It can do nothing but ascertain what, in logic, the judgment was based on—must hold that it settles whatever logic says it must have rested on. So, on the plea of estoppel here, one great question is what does the law say is the foundation of the verdict—what does it, in logic, determine?

Coffey v. U. S., 116 U. S. 436, is illustrative. It rules that where there is an acquittal on a charge which involves, say, the smuggling of goods, and as to which civil suit will lie to forfeit if they were smuggled, this acquittal is a bar to the suit for forfeiture, even though the Government may have failed in the criminal trial because it did not have evidence beyond reasonable doubt and in the civil suit could obtain the forfeiture on making proof by a mere preponderance. To like effect is *U. S. v. Manufacturing Co.* (C. C. A.), 240 Fed., 893; *U. S. v. Sierra* (C. C. A.), 233 Fed., 41. (See pp. 242-243, Original Argument.) *Pinasco v. U. S.* (C. C. A.), 262 Fed., 402, 403.

24c.

It is horn-book law that the test on estoppel by litigation is whether the same evidence will sustain each

of two suits. The scheme is the same in each of the counts—has the one set forth in Count One, by means of reference and adoption. And we submit there is no possible theory of the evidence on which it may be found that the mailing or causing to be mailed is sustained by any evidence as to count 7 that differs from the evidence as to any other count. The evidence was *in solido* and was not directed specifically to either one of the counts, but applies alike to each of them. No count is named. The evidence is addressed to one count as much as to the others, and is as insufficient or sufficient as to any one count as it is to any other.

It consists of custom and habit in the office as to mailing all mail. (See pp. 70 to 76, orig. arg.) There is but a single item peculiar to defendant. It is testimony that, as witnesses recall it, of the officers, the one who "gave directions generally and to the office help was Salinger" (253); that in the opinion of witness defendant "seemed to be the one in charge of the Davidson Building office, so far as the officers and directors are concerned" and that witness so testified as to his thus being in charge during the time witness was in that office, "because we always went to him when we wanted anything." Another witness said that, of the officers, so far as witness had observed, the one who "had general charge of the office work and the direction of the employees" was defendant Salinger (245).

Aside from the question of what probative value this has it appears that one of these two witnesses left the

general offices and went to the plant "in the fall of 1919" (411). The letter exhibited in Count Seven is dated October 23, 1919 (29). So that the record is silent on whether or not the witness had not gone to the plant at the time the letter in that count was (if mailed) mailed. Therefore, the record is silent on how much charge of and directing in the general office defendant had and did at a time when witness was in the up-town office. The other witness testified that from June, 1919, to June, 1920, she worked for the Midland, but that she rotated between the plant and the office about seven months, alternately in each. For all this shows, the having charge and directing she speaks of occurred at some time while she was at the plant. Thayer, who is said to have written the letter in said count, says nothing as to whether at the time this letter was written defendant had the status spoken of by the other two witnesses.

And the presumption of continuity does not affect this proposition. To begin with, to reach it at all there must be an earlier *status* wherefrom to hold that it continued. This presumption cannot rest on anything said by the witness who alternated between the plant and the general office because it does not appear whether the *status* she gives defendant existed earlier than October 23, 1919. Nor may the presumption rest on the testimony of the other witness, because what is involved here is not within the reason of the continuity presumption rule. It applies where something is of such nature as to indicate that it would be apt to continue, say, a progressive disease. It does

not apply say, to being an employee without contract. Such employment may terminate at one moment though it existed the moment before. In fact, the cessation is always sharply defined.

24d.

The law of estoppel because of matter once litigated is elementary.

The first suit determines all that was in issue in it. *Rockwell v. Langley*, 19 Pa. 502—all that needs to be shown is that some one vital point is in issue in both suits. (See pp. 243 to 247, orig. arg.).

The first suit includes all issues that might have been decided in the first.—*James v. Iron Company*, (C. C. A.) 107 Fed., 597; *Bassett v. Railroad*, 150 Mass. 179.

Where the indictment is very general it gives more ample protection against subsequent prosecution because the first prosecution raises a bar to prosecute anything that may be involved in this generality.—*Miller v. U. S.*, (C. C. A.) 300 Fed., 352, 353.

A general verdict and judgment for defendant in an action in which several offenses were set up, either if sustained would justify a verdict in his favor is prima facie evidence that all issues were found in his favor.—*Rhoads v. Metropolis*, 144 Ill., 580.

Where no special issues are submitted and the jury renders a general verdict, it will be presumed on appeal that the jury found for appellee on every issue necessary to sustain the judgment.—*Southern Traction Company v. Wilson*, (Tex.) 187 S. W. 536.

On appeal each element in the prevailing party will be deemed to have been established by the verdict.

Where a question arises as to which of the issues the verdict is conclusive upon there is a presumption that all issues were found in favor of the prevailing party, and whoever denies this must rebut this presumption if he can by showing that the finding was upon some particular issue.—Freeman Judg. 4 Ed. par. 276, page 502.

When a case involves two or more issues, and submitted with the evidence tending to sustain them, and there is a general verdict it is *prima facie* evidence that all issues were found in favor of party receiving verdict, and when judgment on such verdict is presented against recovery in a subsequent suit brought on the same cause of action, the burden of proving that the verdict in the first suit was rendered upon an issue presenting only a temporary bar which has since been removed is thrown on the one who brings the second suit. He must say too, that the jury in the first suit declared upon what issue the verdict is rendered.—*White v. Simonds*, 33 Va. 178.

Without that, the first verdict will bar even what is not found in it in express words.—*Wittick v. Traun*, (Ala.) 62 Am. Decisions, 778.

On the plea of former decision, he who seeks to maintain a second suit has the burden of showing that the issue proposed in the second suit was not in fact settled by the former judgment.—*U. S. v. Clavin* (C. C. A.), 272 Fed., 985; 2 Black Judgment, par. 629; *Halligan v. Dowell*, 179 Iowa, 172.

To a certainty, any verdict of acquittal here must, if the court may not “go beyond the returns,” settle that at least one of two essentials to conviction was lacking. To a certainty, there was involved in each count the question whether or not defendant had devised the scheme alleged and whether or not he had

mailed or caused the mailing of a letter which in reason could be deemed an attempt to effect the scheme. In the words of *Morgan v. Mitchell* (Neb.), 72 N. W., 1055, each of these matters was directly involved in each of the counts. Therefore, there is no need to resort to the rule that a general verdict raises a presumption that all questions were found for the prevailing party, and that he who seeks to maintain a second prosecution has the burden of showing that the finding of the verdict was less general than that. It suffices that in any count upon which there was an acquittal there must have been a finding, either that there was no devising or no mailing. That being so, such finding destroys any verdict of conviction upon either of the other counts, because there is no warrant for the conviction if it be found by the acquittals that one of the elements which must be proved to obtain a conviction do not exist. In other words, an acquittal on the ground that some one element vital to conviction is not established must be a bar to any conviction which requires the proving of that element.

At 3:45 P. M., November 14, 1924, the jury returned and had filed its verdict acquitting the two co-defendants.

Thereupon it retired for further consideration of their verdict as to defendant. Still later, it returned verdict convicting on count seven and finding defendant not guilty as charged in the remaining counts.— And this verdict was filed (472).

Of course the plea of estoppel must rest upon a prior acquittal. On the other hand, it should be conceded that the amount of time intervening is immaterial. It is submitted that the element of precedence in time is present here because the record shows that the verdict acquitting Sawyer and Burlingame was returned before the verdict both for and against defendant was.

It is further submitted that even as between the verdicts dealing with defendant the necessary precedence of time for the acquittal verdicts is in reason shown.

There was an acquittal on count one. It alone exhibited the scheme. To convict on count seven it was necessary to consider count one as to the scheme. It is unreasonable to suppose that being compelled to resort to count one first, on that account, and though it was first in number, that the jury would consider count one to that extent, take no action on it, jump to count seven and arrive at a verdict on that count before arriving at one in count one, or any other.

Again, the court charged that the intent was continuous. The letters were closely related in point of time. It is not in reason to be supposed that this being so the jury picked out count seven in the middle and arrived at a verdict upon it ahead of any in either of the other counts.

Assume it cannot be told whether the acquittals were because the scheme was not established or because the mailing was not proven. Still, the acquittal of neces-

sity means that the evidence was insufficient to sustain one or the other of these two elements. Now, the scheme was identical in all the counts, so if it be assumed that the acquittal was for failure to prove the scheme it was obviously required to acquit on count seven. On the other hand, if one may not say the acquittal rested on that failure, then it must have rested on the insufficiency of the evidence of mailing. If, as seen, that evidence was identical, count seven cannot stand because whichever of the two forks the jury took in acquitting on count one, it had the same situation the same as to count seven.

Ordinarily an estoppel must be based on judgment instead of verdict. In this case the court was asked to entertain judgment upon the verdicts of acquittal and declined to do so. That alone suffices to make the verdict the basis of an estoppel. An appellate court may compel a subordinate court to render a final judgment. *Schendel v. McGee* (C. C. A.), 300 Fed., 273. And as a court has no power to set aside a verdict of acquittal, that verdict becomes a basis for estoppel though there be no judgment upon it. This is so because the court is bound to enter judgment on a finding of acquittal and has no authority to arrest judgment nor to award a new trial. *Freeman*, Judge. (4th Ed.), Par. 251, page 447.

The matters set forth above were raised by ground 8, motion for bill of particulars (46, 47); ground 9 of

Demurrer (65); ground 7, 8, 9, 10, 11, and 12, motion in arrest (474, 475); and grounds 1, 2, 4, 5, 6, 7, 8 and 9, motion for judgment notwithstanding the verdict (476, 477).

XXV.

There was an unfair trial.

For example, the court received vast masses of testimony which it afterwards took from the jury. And most of the trial transcript is filled with this class of testimony.—And even in excluding it, finally, the court exhaustively repeated what it was, and then more or less casually told the jury there should be no conviction upon it. (See pp. 252 to 254 Orig. Argu.)

Where a great deal of evidence has been admitted under a conspiracy count which would have been inadmissible under the other counts and the jury acquitted of the conspiracy but convicted of some of the other charges, the record must be closely scanned to determine whether that evidence may not have been prejudicial to defendants in consideration of the charges on which there was a conviction. *Hart v. U. S. (C. C. A.)*, 240 Fed., at 915. The court says:

The action of the jury in acquitting all of the defendants of the conspiracy charge has (under the circumstances of this case) laid a heavy burden on the prosecution to uphold a conviction of the substantive offense. The verdict of not guilty of conspiracy left for the jury's inevitable consideration a mass of testimony immaterial to the issues passed upon adversely to these plain-

tiffs in error and their co-defendants, yet extremely prejudicial to them.

Where judgment is arrested upon some of the counts because of their insufficiency, this will necessitate setting aside the verdict and granting a new trial as to the other counts, where the evidence introduced under the defective counts was such as to influence the trial of the counts on which there was acquittal. *U. S. v. Tubbs*, 94 Fed., 357.

XXVI.

The instructions were argumentative, contrary to the evidence and not impartial.

We think it was a fair assignment to assert:

"The judge disproportionately emphasized the case of defendant Salinger; that defendant did not have control of the bookkeepers, a matter in control of someone other than he—is not shown to have engaged in bringing about the making of any dummy stock subscriptions—and that, in a word, all permissible testimony or inference is, as against him, the least weighty of all" (470).

The original argument fully presents the reasons for the above statement (see pp. 294 to 309). Though the judge did say the matter was for the jury, his charge amounted to telling the jury to acquit Sawyer and Burlingame, and in the face of a record that shows defendant was their subordinate, and which preponderates very heavily against them. And the differentiation rests upon a misapprehension of the

testimony (R., 459, 460, 463, 457, 458, 461, 462, 463, 176, 171—and see pp. 247, 248, 249 to 252 original argument.

As said in *Sandal v. U. S.* (C. C. A.) 213 Fed., 569:

“Where the charge consists of emphatic statements having a tendency to suggest how a question of fact should be decided, the situation is not cured by the disclaimer on part of the judge of a purpose to control the jury by such remarks, or by a qualification thereof in directing the attention of the jury to the essential issues. (See pp. 301 to 307 Orig. Arg. and R., 460, 461, 462.)

“In *Mullen v. U. S.* (C. C. A.) 106 Fed., 892, the court, speaking through Mr. Justice Day held that where the charging is of a character injurious to the defendant, the error is not cured by the disclaimer on the part of the judge of a purpose to control the jury by such remarks, or by a qualification thereof in directing the attention of the jury to the essential issues, because the effect of such positive and emphatic statements could not thereby be removed from the minds of the jury. And in *Rudd v. U. S.* (C. C. A.) 173 Fed., 912.

And in *Rudd v. U. S.* (C. C. A.) 173 Fed., 912, the court, speaking through Hook, Judge, declared:

“While it is the right of a judge of the Federal court in a criminal as well as civil case to comment on facts, his comments should be judicial and dispassionate and so carefully guarded that the jurors who are the triers of

them, should be left free to exercise their independent judgment. A mere withdrawal of words and direction to the jury that the question is for them, is not always sufficient."

"It goes almost without saying that the comments must be impartial and not one-sided. *Burke v. Maxwell*, 81 Pa. St. 183, quoted with approval in *Starr v. U. S.* 153 U. S. 616."

Deductions and theories not warranted by the evidence should be studiously avoided. *Foster v. U. S.* (C. C. A.) 188 Fed., 310.

For less than this there was a reversal in *Hix v. U. S.* 14 Sup. Ct., 40.

XXVII.

The books of the Midland were received without foundation; there is no other way to put it. (See original argument, pp. 190, 195, and see 212.)

It is not amiss to add and, in a sense to repeat, that in view of the statement of Atkinson that he was with the Midland intermittently until the first of October or the first of November, and that it is then he "went there as an employee of the Midland," and that "prior to that time he was with an auditing company from Chicago" (225)—his statement that other clerks worked on the books before witness was employed by the Midland is of the utmost importance (225). The letter exhibited in count 6 is dated June 21, 1919, the one in the conviction count, October 23, 1919, in count 8, November 4, 1919, in count 9, June 11, 1919, in count

10, August 22, 1919, the one in count 11, October 24, 1919, and the one in count 14, June 20, 1919—which spells that the entries bearing on the very count on which the conviction was had may have been made by those who worked on the books before Atkinson was employed by the Midland. And Atkinson could not possibly furnish a voucher for *all* the entries in any of the books because other clerks worked on these prior to the time Atkinson was employed by the Midland (223). And one Edgett kept the books as much as Atkinson did.

By means of permitting Tripp's testimony which was on books put in without foundation the jury was told, among other things, how much salary the defendant received; how much was spent in construction work with which he had no connection; how much for advertising with which he had no connection; how much for entertainment without any attempt to show any connection on his part; the cost of operating, he having nothing to do with operation; the cost of incorporating with which he had nothing to do. It was shown that the stock had been raised from three and a half million to eight million dollars, and defendant had nothing to do with it and was not a member of the board of directors. This testimony revealed what sort of a commission contract had been made with Baine, a contract defendant had nothing to do with. Tripp was permitted to go into the details of the "fake dividend." Dividend paying was controlled by the board of directors, and defendant had nothing to do with that either. He put the dummy subscriptions got by Sawyer and Burlingame before the jury (R., 326).

As to the general run of prejudicial testimony given by Tripp, see R., 334 to 339, both inclusive; 343, 344, 345, 327, 329, 330, 331.

He was allowed to prove negatives by these books. For example—that as to the premium found the books were silent as to what had become of a large part of it; that persons who had given “kit” letters asserting they were stockholders were not shown by the books to have been stockholders at that time (R., 332, 333, 351, 352, 353, 354, 355).

Better foundation was held insufficient in

Phillips v. U. S. (C. C. A.), 201 Fed., 259.

Ammerman v. U. S., 267 Fed., 143.

Rosenthal v. McGraw (C. C. A.), 138 Fed., at 724.

Chaffee v. U. S., 85 U. S., at 524, 528, 529, 536, 538, 540, 541, 542, 543.

Rumley v. U. S. (C. C. A.), 293 Fed., 532.

Books are hearsay where the basis for their reception that testimony that witness examined the charges made therein, but that he did not make them and where those books in no manner authenticated.

Rosenthal v. McGraw, 138 Fed. at 734 (C. C. A.).

To like effect is *Reineke v. U. S.* (C. C. A.), 278 Fed., 724. And the case of *Louisville Ry. Co. (Ky.)*, 172 S. W., 1051. (See pp. 217, 218, original argument.)

State Bank of Pike v. Brown, 53 L. R. A., 521.

The testimony of Tripp was objected to, for one thing, that he was incompetent because no foundation had been laid which qualified him to give evidence as to what the books exhibited in that the books themselves were incompetent because not properly authenticated; that no foundation had been laid, and that there was no evidence that a single entry in any of the books of the Midland were or are correct, wherefore, defendants were not bound by their contents. (319, 320.)

Miller v. U. S., 133 Fed., 353.

Feuchtwanger (C. C. A.), 187 Fed., 713.

Without foundation for the books the summation by an expert as well as the books are hearsay.

State Bank of Pike v. Brown, 53 L. R. A., 513,
521, 522.

And one position taken on the oral argument deserves special mention. In effect it was that in the teeth of cases like Phillips v. U. S. (C. C. A.), 201 Fed., 259, and the Keen Savings Bank case, the banker evidence was rightfully received in a criminal case though counsel conceded it should not be received in a civil one. To put it another way, that such evidence as was here put in would not be permitted in a suit to recover for a grocery bill but was admissible against liberty. To state this is sufficient argument against it. Related was the claim that since the bank was a stranger to the suit, this made this testimony competent. One reason for excluding it has always been that it was *res inter alios acta* because the one adducing it was a stranger

to the suit. That is one thing that is ruled in the Keen Bank case.

XXVIII.

Matter received over objection of hearsay.

For example—the court received testimony as to the insertion of advertisements circulated to aid the promotion of the Midland corporation, though there was no foundation except that the taker of one of these advertisements had a talk in reference thereto with Baine and Taylor (318).

A conversation between Burlingame and Baine held at Des Moines and in which Burlingame mentioned the fact that property could be secured on the stock-yards at Sioux City and he would bring to Des Moines and have Baine meet a friend of Burlingame's named Salinger, which, according to Baine, was done on the third meeting between him and Burlingame, which was the first meeting of Baine and Salinger (114, 115).

Exhibit 499, a detailed statement by Tripp of the stock sold at \$125 a share coupled with statement that but some \$54,000 of the premium money received ever got into the treasury of the Midland (350, 351).

Exhibit 264 dealing with an alleged charge to the account of Taylor in \$2,535.00 under date of June 27th, and one in \$1,137.50 under date of July 5th (207).

Testimony that Exhibit 243 has reference to a credit to the account of defendant under date June 26, 1919, and in \$4,537.50. And Exhibit 260, ledger sheet of the Midland with the Nelson Bank showing a deposit of \$3,162.50.

Exhibit 234, a report of subscription sent down to the Midland Packing Company, and cash or its equivalent with it to the extent of \$75.00 per share (172).

A number of the "little slips," being unintelligible notations made on an adding machine, and purporting on the testimony of Bolich to show what was remitted to the Midland, to wit, among others, Exhibits 234-*a* to 234-*c*, both inclusive (173); Exhibit 236-*a* (176); Exhibit 237-*a* and *b* (177); Exhibit 239-*a* (178); Exhibit 240-*a* (178, 179); Exhibit 242-*c* (179).

Ledger sheets, First National Bank of Iowa Falls, Exhibit 239, report of Taylor to Midland (395), objection (178). And Exhibit 253, ledger sheet of that bank, Exhibit 252, deposit slip (191, 192, 395, 396), which is said to be a copy, the original of which is in the Merchants' National Bank of Cedar Rapids, and which deals with an item of \$1,937.50, claimed to have been deposited to the credit of defendant (192).

Exhibit 255 which purports to be a letter addressed to defendant under date January 5, 1920, which has no signature and closes with but "Very truly yours—assistant cashier," and purports to enclose a certificate of deposit of \$3,802.28 in payment of described certificates plus interest (380, Objection on 194). This was a carbon letter (396). Objection additional to hearsay was that it violates the guaranty of the Constitution of the United States, giving defendant the right to be confronted with the witnesses against him (380, Objection by reference, 373, also 194).

Resale agreements, to wit, personal agreements between Colby and the owner of stock (147, 148).

Various subscription contracts, to wit, Exhibit 183 (112), Exhibit 343 (308), Exhibit 344 (309), Exhibits 345 and 346 (212), Exhibit 363 (278, 279, 282), Exhibit 365, Exhibit 366, Exhibit 367 (282), Exhibit 372, Exhibit 373, Exhibit 374, Exhibit 375, Exhibit 376 (301, Obj. 373, 374), Exhibit 377 (301), Exhibit 386 (277), Exhibit 387, Exhibit 389, Exhibit 390 (211), Exhibit 401 (306, 307), Exhibits 403, 404, 407 and 407-*a* and 406 (288), Exhibit 412, Exhibit 413 and Exhibit 414 (297).

And Exhibit 296, the letter set out in count 10 of the indictment, being one from Sawyer to Hartman enclosing a stock certificate (306).

Exhibit 284, a record of notes as they stood when the International Auditing Company wrote up the books of the Midland with changes from time to time until Atkinson turned it over to Stokes (234, 235).

Exhibit 240, a letter purporting to be signed Tom G. Taylor & Company, per ———, addressed to the Midland Company and stating that "pursuant to your promise" the writer had sold described shares of stock for H. E. Martin and that he is submitting enumerated cash, notes, bonds, to apply against the note of Martin (378, Objection including denial of confrontation 378, reference for objection to 373).

On the offer of 210-*a* the court sustained the objection that it was hearsay against just such an item as is above listed (147).

Question: "Again handing you Exhibit 243, the ledger sheet of the account of B. I. Salinger, Jr., and ask you to state whether or not there was a deposit made in that ledger sheet under date of November 5th, 1919, in the sum of \$1,937.50." Defendants object it is incompetent, immaterial, irrelevant and calls for hearsay evidence.—Overruled. Answer: "There was" (R., 191).

This is in the testimony of Nelson who did not make the entry and had no knowledge concerning it.

Tripp testified that the books of the Midland Company show the entry of subscription of Krebs; that the first entry as to this subscription contract would be in the subscription register and is at line 36 of page 42 of Exhibit 13.

Question: "Read into the records that entry shown by Exhibit 13." Defendants object, no proper foundation has been laid and it is hearsay.—Overruled. Answer (reading): "W. H. Krebs, number of applications, 7,819; number of shares preferred stock, 9,500; amount of stock, \$950,000; class detail, under the general head; payments received with applications, \$237,500; notes \$712,500. That is the entry in the subscription register." And the witness under like questioning and over the same objection was permitted to read at line 26, page 37 of Exhibit 15, as follows:

"W. H. Krebs total on page headed 'cash receipts'—total, \$237,500; subsequent collection, preferred \$237,500. And over in the column headed 'bank deposits' are the figures under the subheading 'cash' of \$237,500" (R., 327).

In the absence of foundation the books and a summation of them by an expert are hearsay.

State Bank of Pike *v.* Brown, 53, L. R. A., 513, 521, 522.

See Edwards *v.* Bates County (C. C. A.), 99 Fed., 905.

Written hearsay is no more competent than spoken hearsay.—Union Pacific Railway *v.* Perrine (C. C. A.), 267 Fed., 651; Board *v.* Keene (C. C. A.), 108 Fed. at 508, 510.

The court has no discretion to receive hearsay testimony.—Union Pacific Railway *v.* Perrine (C. C. A.), 267 Fed., 657; Association *v.* Skyrock (C. C. A.), 73 Fed., 774, 777.

As to *res inter alios acta*, see Board *v.* Keene (C. C. A.), 108 Fed., 505. Wherein it is held that even if what is mere hearsay is in writing and signed it is still *res inter alios acta* in a suit to which the signer is a stranger. And see pp. 318 to 321 Orig. Arg.

As to the right to confrontation, see Cook *v.* State, (Okla.) 120 Pa., 1038.

Hearsay may constitute a deprivation of the constitutional right of confrontation. Delaney *v.* U. S., 263, U. S. at 590, citing

Diaz *v.* U. S., 223 U. S. 442, 450,

Howland *v.* Boyle 244 U. S. 107, 108,

Spiller *v.* Ry., 253 U. S. 117, 130.

In several instances we added denial of confrontation to hearsay. But it seems ^{not} to be required that the objection should in terms assert such denial. In Delaney *v.* U. S., 263 U. S., at 590, it is said that the reception of hearsay can become a Federal question if received "against objection." It would seem that an

objection asserting hearsay, especially where incompetency is also urged, is a sufficient objection. Hearsay is objectionable on the sole ground that there is no opportunity to cross-examine the person whose statements the witness is repeating. The use of the word hearsay of necessity then advises the court of a complaint that cross-examination is being denied, which necessarily includes the assertion that the party is not being confronted with the one who is absent and therefore may not be cross examined.

28a

Much other testimony was erroneously admitted. For example, in addition to the insufficiency of the testimony on mailing, witnesses were permitted to say that they imagined or supposed that a letter had been mailed and that they intended to mail it (pp. 79 to 82, original argument). In the teeth of decisions such as *McDonald v. U. S.*, 241 Fed., at 794, 799; *Worden v. U. S.*, 240 Fed., at 8, 9, 10; *Galbreath v. U. S.*, 257 Fed., 648, 649, and *Sparks v. U. S.*, 241 Fed., at 792, which rules as to the president of the corporation involved that the jury should have been instructed that he was not merely by virtue of his office charged with a knowledge of the contents of the books of his bank and which cites *Worden v. U. S.*, *supra*. Defendant was not permitted to show by an expert whom the Government had used and who had knowledge of the fact, that defendants had not been made acquainted with the contents of the Midland books and that one having

no bookkeeper's knowledge would not have been informed by the books had he seen their contents. It permitted the Midland books to go to the jury *en masse*, despite decisions like *Bates v. Prohle*, 151 U. S., 149; *Kalamazoo Company v. McAlester*, 36 Mich., 327; *Boykin v. U. S.*, 11 Fed. (2d), 484 (see original argument, pages 208 to 211). It is true it ruled first that this should be done. But it afterwards overruled objections on the ground that all the books must be put in to furnish a basis for testimony in the nature of a summary. All of which was error without reference to whether the books were sufficiently authenticated or not. As has already been noted, the court did not stop with receiving such items transmitted by Bolich as corresponded in amount with deposits to the credit of defendant, but received all the items transmitted and all the items credited. In reason and in accordance with *Culver v. U. S. (C. C. A.)*, 257 Fed., at 65, this could have but one effect, namely, to create an argument in the jury room along the lines that defendant must have converted money or he would not have had so large an amount of deposits. And to like effect in principle is *Cohen v. U. S.*, 291 Fed., at 369, 370, and *Heaton v. U. S.*, 280 Fed., at 669, *Hyde v. U. S.*, 32 Sup. Ct., 807, *Booth v. U. S. (C. C. A.)*, 139 Fed., 256 (see pp. 273 to 277, original argument).

It permitted witnesses to be interrogated as to the general practice and custom in their bank concerning making up items on ledger sheets from items on deposit accounts (R., 191). When at one time the district attorney attempted to withdraw a question along

this line because objection was made, the court said it was a natural question and insisted that it should be put in (R., 184, 185).

28b.

Though the evidence showed defendant was never a director, had nothing to do with incorporating the company and was not in charge of the operation of the plant, Tripp was permitted to state what salary each defendant received; that the corporation had borrowed large sums and made large payments for interest and discount; the cost of construction; that a large sum had been paid for commissions; how much was spent from an entertainment fund; and for law expenses. All this assailed by motion to strike (401); Ground 20, Motion to Direct (425), and by requests to charge, 1-a, 16, and 1-a (428).

As to testimony dealing with the documentary evidence of the steps taken to incorporate the Midland, it is in the first place in improper form and should have been rejected on the objections made. Passing that, it was highly prejudicial to permit the defendant to be connected with the incorporating when it was the undisputed evidence he never had anything to do with it and was never a member of the Board of Directors; and to permit Tripp to make this prejudice active by telling the jury the books showed that large sums had been expended in construction, in the payment of commissions, in entertaining, advertising and in law expenses (75, 76, 77, 368, 391, 392). See pages 183 to 187, original argument.

The court charged in the most express and plenary terms that there was reason to believe the project would be successful and that such profits as were represented might accrue. (447, 448, 449. See pages 285 to 289, original argument.) But when defendant attempted to show that aside from expectation of profits the project was a good faith one and failed because of unforeseeable conditions—the court declined to permit this to be shown by Stokes. He had thoroughly qualified himself in direct for the Government to speak to the matter inquired of. The Government had him show that the corporation suffered a loss and that he knew what that loss was. But on objection that it called for a conclusion and was improper cross-examination the court declined to let him say whether it was not true that all packers during that same time operated at a loss (104).

After he had said he was familiar with the plant and knew in a general way how well or how poorly it was built, the court declined (because of objection that it was incompetent, irrelevant and immaterial, not proper cross-examination and called for a conclusion) to let him answer whether the shortage in capital he had referred to might not in large part be due to the fact that the plant was builded a great deal better than in all necessity it might have been, and that if this had not been so there would have been an abundance of capital remaining (91).

When he was asked to state more fully with reference to conditions leading up to the failure to which he had already spoken the court sustained objection that this was too general, and in so doing, said:

“What is it you have in mind, he said there was a cessation in the payment of notes that there had been labor delays, and there was a failing of prices of hogs, Etc.”

Here, the District Attorney added that the witness had also assigned the lack of money.

The court continued: “Well, if there were other matters you may go into them briefly.”

Thereupon, Stokes said that one of the principal reasons was due to an insane lawyer in Sioux City. The District Attorney objected that this was a mere conclusion and was incompetent and the court said:

“You want to show there was an attack made on the company as well as on the subscribers?”

Counsel for defendant, answered, “Yes.”

Court: “I think that is too remote from the inquiry.” 414.

Next, Stokes was asked to say whether he had related all the conditions that led to the failure or closing of the Midland and said he thought he had given reasons for them. He was then asked whether there were any other reasons or conditions which affected the credit or financial condition of the plant. The court sustained objection that this was a conclusion and immaterial. Thereupon, counsel for defendant said it was his thought that this affected the

matter of operation quite as directly as the price of commodities being dealt in, and the court then sustained the objection and said:

"I assume that there were probably too many conditions to ever bring out all of them, that conspired together to close the plant. That is pretty clear right now, and I don't see where we get anywhere by going into a review and consideration of them all (414, 415).

On the objection of the Government that it was improper cross-examination the court would not permit Stokes to say either from his own knowledge or upon his knowledges of the books whether it was not true that on the very day the Midland was put into the hands of a receiver it was a solvent corporation (106).

CONCLUSION.

It is true there were protracted efforts to avoid removal to South Dakota for trial (2). We believed the removal was not authorized by the Constitution, and feel that this record indicates that being tried in South Dakota was a great hardship. Be that as it may, we do not understand what the resistance to removal has to do with this writ of error.

All should concentrate upon the matter in hand.

The opposing brief declares:

"It is not exaggeration to say that almost all done on the trial was the subject of every conceivable kind of objection" (32).

This may have been our misfortune rather than our fault. Whether it is the latter depends upon whether it was proper to make "almost every conceivable kind of objection." If, say, gross hearsay was constantly put in, we would have failed in our duty had we not as constantly saved the record for relief in the appellate court. It is further declared that the efforts of the prosecution were met by most persistent and ingenious obstruction. This may be merely a polite way of complaining that all the efforts of the prosecution were not necessarily thought to be unwarranted by the law. So thinking it to be the fact that these "efforts" consisted largely of persistent offering of manifestly improper testimony, we are glad to be advised that our resistance was "most persistent and ingenious." In the assumed case, such "obstruction" would become a duty.

We claim nothing for the fact that the enterprise was building and operating the legitimate business of a great packing plant, that actually operated. It has no real bearing except that it should help to avoid rulings occasionally made that errors are harmless because the testimony of guilt is conclusive. It should save from that line of rulings that the trial court instructed that the plant was a fine one, and undisputed testimony that it was. There is not a scintilla that anyone schemed to get money for nothing. Money was obtained to build a great packing plant, and it was built. If there was anything wasteful in its building there is no evidence that defendant is chargeable with it—and surely, such wastefulness would not prove a

scheme to defraud. There is no evidence that defendant ever made a single representation or statement or promise that evinces any fraudulent intent. Indeed, there never was so long a record as this with so little of representations for which defendant is chargeable. The more one studies this record the more he wonders why there was the conviction.

It is said in *Vicksburg Railway v. O'Brien*, 119 U. S., 99, that where there is error in the record the Supreme Court will direct a reversal unless it appears beyond doubt that the errors complained of would not and could not have prejudiced the rights of the party. Error is presumed to be prejudicial unless it "is impossible to see that it could possibly have injured the party who complains of it." *Kalmanson v. U. S.* (C. C. A.), 287 Fed., 72. If ever a record was filled with errors it is this one. And no court should say it appears beyond doubt that they would not and could not have prejudiced the rights of the plaintiff in error. Many of them are of such character that it appears beyond doubt, as matter of common knowledge, that they must have worked greatly to prejudice—the fact that here there was a conviction at all shows that these errors were prejudicial—shows that the verdict rests not upon law or evidence but upon an atmosphere created by those errors.

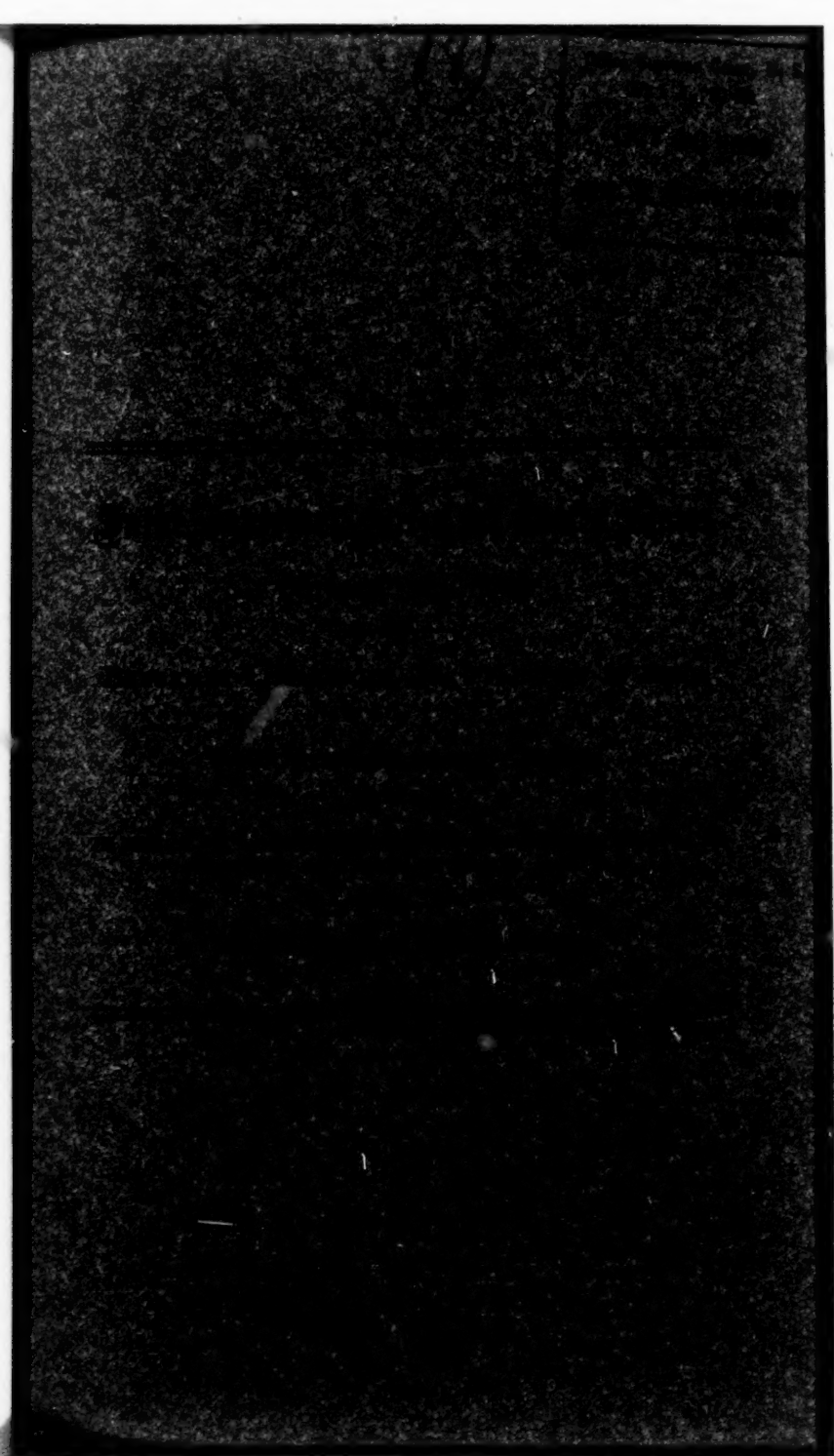
Since it is the law that no ruling on motion for bill of particulars or on motion for new trial, the making of the motions merely absolves from negligence. We were not negligent. We made every effort to be advised of why certain accusations were made, and

brought the attention of the trial court to what we conceived to be trial errors. We ask and believe we shall receive what the law gives; no more, no less. We respectfully submit that the law should set defendant free.

B. I. SALINGER,
ARTHUR F. MULLEN,
ROBERT HEALY,

Attorneys for Plaintiff in Error.

(3297)



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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 238

BENJAMIN I. SALINGER, JR., PLAINTIFF IN ERROR

v.

THE UNITED STATES OF AMERICA

*IN ERROR TO THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF SOUTH DAKOTA*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The case below is not reported and no opinion was rendered by the District Judge. The charge to the jury, however, is found in the record beginning at page 437.

JURISDICTION

The writ of error brings up for review a judgment of the District Court for the District of South Dakota, finding the defendant guilty of a violation of Section 215 of the Criminal Code and sentencing him to four years' imprisonment and a fine of \$1,000. The judgment was entered on the 29th day of November, 1924. (R. 482.) The writ of error

(1)

was allowed on the same day. (R. 483.) The bill of exceptions was not settled until the 29th of June, 1925. (R. 485.) The brief of the plaintiff in error, page x, states that the writ was brought under authority of Section 201 of the Judicial Code. That is probably a misprint for Section 238 as in force at the time the judgment was rendered.

The constitutional questions which form the basis for invoking the jurisdiction of this Court are discussed in this brief beginning at page 24. Whether or not they are sufficiently substantial to sustain it, the Court must of course decide after hearing them presented. We do not urge that they are not.

STATEMENT

The plaintiff in error, Salinger, together with Fred C. Sawyer and C. H. Burlingame, were indicted on May 20, 1922, for a violation of Section 215 of the Criminal Code (using the mails to defraud). After protracted efforts by Salinger to avoid removal to South Dakota for trial, this Court on May 26, 1924, sustained an order of removal. (*Salinger v. Loisel*, 265 U. S. 224.) In the fall of 1924, the exact date not appearing, the trial was begun and proceeded at great length until on November 14, 1924, the jury rendered a verdict acquitting Sawyer and Burlingame, and convicting Salinger under the seventh count of the indictment. Judgment was entered upon the verdict and writ of error from this Court sued out upon the ground that a constitutional question was involved. The

assignments of error are 57 in number and fill pages 487 to 561 of the record. The Clerk's return to the writ is dated November 2, 1925 (R. 2), and was filed in this Court three days later. On April 12, 1926, the Government moved to advance the case. The motion was granted and the case was advanced and set for argument on October 18, 1926. Owing to the great length of the record and the numerous and complicated assignments of error it has been, as a practical matter, well-nigh impossible to take steps toward disposing of the case more promptly.

THE INDICTMENT

The indictment (R. 2-40) alleges 14 specific instances of misuse of the mails, each set forth in a separate count and all preceded by a general count alleging that the defendants, during the month of November, 1917, devised a scheme and artifice to defraud the Midland Packing Company, a corporation thereafter to be created, and certain named persons and divers unknown persons, generally referred to as "victims," by securing subscriptions to stock of the Midland Packing Company. The nature of the scheme as alleged may be summarized as follows:

On March 12, 1918, the defendants caused the Midland Packing Company to be incorporated under the laws of Iowa, with a capital stock of \$3,500,000, which was increased on February 1, 1919, to \$8,000,000. Sawyer was president, Burlingame was secretary and treasurer, and Salinger

was vice president and general counsel of the company. (R. 4.) The defendants caused one Baine to enter into an agreement with one Statter, and Statter & Company, packers, for the purchase of a plant for the sum of \$250,000. Thereafter, on June 18, 1918, they caused to be issued to Statter 4,854 shares of stock of the corporation as a pretended consideration for the purchase of the property which Statter had contracted to sell for \$250,000, and of the stock so issued they caused to be transferred to themselves and others 2,354 shares, which were sold as the stock or property of the corporation for their own use and benefit (R. 6-8), though they had represented to the executive counsel of Iowa, in connection with application for authority to issue stock, that the value of the property and price to be paid therefore was \$564,900, subject to an incumbrance of \$79,000 (R. 7).

That as a further part of the scheme they caused to be made to the South Dakota Securities Commission, for the purpose of securing authority to sell stock in that state, the false representations with respect to the facts involved in the purchase of the property and the issue of the stock, thereby obtaining from the Commission the right to sell stock in that state.

As a further part of the scheme they caused an agreement to be entered into between the corporation and Baine, whereby Baine had the exclusive right to sell the capital stock, and which provided

that at least 25 per cent of the selling price of the stock should be collected in cash and that notes would be taken for the balance, and that Baine should receive 20 per cent commission to be paid out of the initial payment received for the stock, which agreement was subsequently modified to provide for the payment to Baine of 5 per cent additional commission in certain cases and which agreement was afterwards assigned to Tom G. Taylor & Company.

It is further alleged that as a part of the scheme Baine and Taylor would employ a large number of stock salesmen, who would make various representations, among them being that the "victims" would not be called upon to pay the notes which they gave, as the increase in the value of the stock and the dividends to be received would be sufficient to take up the notes.

It is further alleged that the defendants, as part of the scheme, entered into pretended agreements for the sale of large blocks of the stock with irresponsible persons, which agreements would show that the subscribers were to pay the par value of the stock of the corporation, thereby making it appear that large blocks of stock had been sold the purpose being to pay themselves, through Baine and Taylor, large commissions out of the funds of the corporation, when in fact the defendants had agreed with the subscribers that they would not be required to pay for the purchase of the stock so subscribed for, but would receive a small quantity

of stock for signing the subscriptions, the object being to enable the defendants to resell the stock at 125 or more per share, the proceeds of the sale in excess of the par value to be divided among and appropriated by the defendants; that the defendants, in furtherance of the scheme, subscribed for large blocks of stock at par with intent not to pay for it but to resell it at a profit to themselves.

That as a part of the scheme they paid dividends of 7 per cent out of the proceeds of the sale of capital stock at the expiration of one year after the stock had been paid for by the "victims," representing that the dividends had been earned and were legitimate profits, the object being to assist Taylor and the others to sell more of the stock on the faith of the dividends. (R. 14.)

It is further alleged that defendants made other false representations to the South Dakota State Securities Commission, with respect to the company, for the purpose of inducing that Commission to continue in force the authority to sell stock within that state. (R. 15.)

It is further alleged, that having devised the scheme, and for the purpose of executing it, they caused to be delivered by mail various letters, each one of which is set forth under a separate count, numbered 1 to 14.

The letter in the seventh count, upon which Salinger was convicted, was addressed to Martin Christiansen, Viborg, South Dakota. (R. 29.)

In support of these allegations a great mass of testimony and exhibits was received.

THE EVIDENCE

The Midland Packing Company was organized under the laws of Iowa about February, 1918, with a capital stock of \$3,500,000, which was subsequently increased to \$8,000,000. (R. 366.) It went into the hands of a receiver May 7, 1920. (R. 103.) Sawyer was president, the defendant Salinger was vice president and general counsel, and Burlingame was secretary and treasurer. (R. 364.) Sawyer, Burlingame, and one Rose Sifford constituted the Board of Directors. (R. 368.) One Statter, or Statter & Company, was operating a packing plant in Sioux City, which had been incorporated through Salinger in 1915. (R. 135.) In November, 1917, Salinger, Statter, and one Baine had a conversation about selling the Statter plant, as a result of which Baine and Statter entered into a contract. (Exhibit 186.) By this contract Statter agreed to sell the plant to Baine for \$250,000, payable \$25,000 in cash, \$25,000 in stock, \$100,000 in noninterest-bearing certificates of deposit, and two notes of \$50,000 each drawing six per cent interest. (R. 136-137.) Upon the organization of the company it applied to and received authority from the Iowa Executive Council to issue its stock for \$485,400 in exchange for the Statter property. (R. 369.) On April 9, 1918, the directors authorized the issue of this stock for that pur-

pose. (R. 365.) The books of the company show that there were issued to Statter 4,854 shares of stock of the par value of \$485,400. (R. 320.) All the certificates for this stock, except one for 250 shares, remained attached to the stubs at the time of the trial. The original certificate for 250 shares had been detached and pinned to the stub. (R. 321.) The testimony with relation to this stock was given by the witness Tripp, an accountant and national-bank examiner employed by the Department of Justice, who, after the appointment of a receiver for the company, was engaged for six or eight months in examining into its operations. The original certificate for 250 shares had been split up into two, one for 230 shares in the name of Statter and one for 20 shares in the name of B. I. Salinger, Jr. Statter testified (R. 138) that though he receipted for and indorsed the certificates standing in his name he never actually received any except the one for 250 shares (R. 137). Of the 4,854 shares which were supposed to have been issued to Statter the book shows that 250 shares were actually issued to him; 400 shares were issued to F. C. Sawyer; 125 shares to B. I. Salinger, Jr.; 125 shares to Burlingame; 1,090 shares to B. I. Salinger, trustee; and 514 shares to various persons, and that the remaining 2,250 shares (R. 324) were issued to the Midland Packing Company. This is explained as follows:

At a meeting held on June 1, 1918, the directors authorized the president and secretary to purchase

back at par from Statter \$225,000 of the stock theretofore issued to him and to pay for the same in cash, notes or other assets of the company (R. 366). The records of the company (R. 324), as well as the testimony of Statter (R. 138), show that it paid to Statter \$25,000 in cash, \$95,400 in certificates of deposit, \$4,600 in liberty bonds, and notes for \$100,000. This and the 250 shares of stock was all that was actually paid for the property. Thus Baine's agreement with Statter was in substance carried out, and of the 4,854 shares authorized to be issued in exchange for Statter's property only 2,500 were actually used for that purpose.

As soon as the company was organized an intensive campaign for marketing its stock was begun under the direction of Baine, the man in whose name the original contract of purchase had been taken. The contract so made with Baine, known as Exhibit 187, was approved by the directors at the first meeting of the Board held on March 23, 1918. (R. 365.) By this contract Baine was authorized to sell the stock at par, receiving not less than \$25 per share in cash or its equivalent and the remainder in notes. He was to receive a commission of 20 per cent. The rate of the commission was subsequently increased to 25 per cent and the contract was, in November, 1918 (R. 121), transferred to Tom G. Taylor & Company, Taylor apparently paying or agreeing to pay Baine \$75,000 for his contract, of which \$25,000 was paid in cash.

Inasmuch as Taylor did not have that amount of money the company loaned it to him. (R. 126, 127.) This stock-selling campaign was conducted by agents.

In the early part of 1919 (R. 129, 130) the first so-called resale contracts seem to have been made. The price of the stock was advanced April 1, 1919, to \$125 a share. (R. 326.) In substance the claim of the Government was that subscriptions for large blocks of stock at par would be taken from dummies or from persons with whom an understanding was had that they should not be called upon to pay for the stock. Thereafter subscriptions would be received from other persons at 125, and these subscriptions at 125 would be applied in satisfaction of the dummy subscriptions at par. The commission of 25 per cent upon the entire \$125 a share would be retained by Baine or Taylor, or the amount thereof paid to them by the company, the net result being that, in addition to the \$75 a share going to the company upon the sales at par, an additional \$18.75 should have been received by the company upon each share sold at \$125. (R. 129-131.) These subscriptions at \$125 were taken in the name of the company, and each subscription would be turned into the company and a separate file kept of each subscription. (R. 87.) Subscriptions at \$125, which were applied upon other subscriptions at par, were rubber stamped, and in this way Tripp was enabled to trace all these transactions. (R. 325.)

His examination shows that there were 73 subscriptions for 47,722 shares of the par value of \$4,772,200 upon which other subscriptions were applied. The subscriptions thus applied amounted to 23,839 shares at \$125. These subscriptions were not entered upon the subscription register. (R. 325, 326.) The advance in price was made April 1, 1919. (R. 326.) During the month of March, 1919, subscriptions for 42,547 shares were taken at par; 26,026 shares were sold at \$125 per share. (R. 334.) The premiums upon 2,187 shares, amounting to \$54,675, were paid into the Treasury of the company. (R. 334.) The premiums upon 23,719 shares, amounting to \$595,975, were not paid into the Treasury. That amount represented the premiums on subscriptions applied on other subscriptions, and after deducting commissions the amount which the company should have received upon the basis of \$16.75 per share was \$446,981.25. (R. 335.) A complete statement and analysis of these resales, compiled from the books and records of the company by Tripp, was put in evidence as Exhibit 498. (R. 349.) Some of these resales were as follows:

The witness Martin signed a subscription for 9,500 shares of stock at \$100 a share. (Exhibit 218, R. 161.) He did this at the request of Burlingame. Burlingame asked him if he would sign an application for some stock and give a note for it, and he said he would. He never expected to pay the note. Burlingame told him he would take care

of it. He never got any stock and never paid any money. After a time, upon demand, he received back his note. He never expected to pay the note, never got any stock and never paid any money. (R. 161, 162.) Upon this subscription there were applied subscriptions for 4,342 shares at \$125 (R. 336), the premium being \$108,550.

F. C. Sawyer, President of the company, subscribed for 7,112 shares at par. On this subscription were applied subscriptions for 6,250 shares at 125, the premiums being \$156,250. (R. 336, 330.)

The witness Krebs was a salesman. He signed three subscriptions for stock (Exhibits 230, 231, and 232, R. 163), and says they "were made as an expedient at the time." At that time he had a desk in the office of the Midland Packing Company and "Mr. Salinger was in the same office." Exhibit 230 was a subscription for 9,500 shares of stock at a par value of \$950,000. He gave no money at any time and his best recollection was that he gave a note. (R. 164.) Somewhat reluctantly he admitted that he discussed with Mr. Salinger "the advisability of the thing." The only one that he recalls discussing it with was Mr. Salinger. (R. 166, 167.) Upon his subscription there were applied subscriptions for 817 shares at 125, the premium being \$21,700. (R. 337.)

The witness Beman, at the request of Sawyer, signed a subscription for 250 shares of stock. (Exhibit 241, R. 182.) Sawyer told him that he would take care of it, would handle the transaction,

and that he (Beman) would have nothing more to do with it. He signed a note for \$18,750 and delivered the note and the subscription to Sawyer. He never paid anything more, never received any stock and does not know what became of the note. Upon his subscription were applied subscriptions for a like amount of stock at 125, the premium being \$6,250. (R. 337.)

The witness Day, at the solicitation of Sawyer, signed a subscription for 1,000 shares of stock sometime in the spring of 1919, and gave a note for \$75,000, and Sawyer gave him a receipt for the stock "to protect me (that is, the witness) in case anything happened to him." (R. 141.) Afterwards Sawyer returned the note and Day returned the receipt and never had any of the stock. Upon his subscription were applied subscriptions for a like amount at 125, the premiums being \$29,225. (R. 337.)

Knowledge of such transactions was traced directly to Salinger. The witness Taylor, the sales agent, testified to conversations with Salinger as to the approval of resales. (R. 129.) Exhibit 506, a letter on Midland stationery, dated September 13, 1919, signed by Salinger and addressed to Taylor, was put in evidence. (R. 108.) In this letter he tells Taylor to have Mrs. Palmer make the usual report and give it to Mrs. Van Riper as early as possible within the week, because if it is not done there is delay in the issuance of the stock and things

get behind, and it is difficult to catch up, and continues:

Please place all stock this week on the Sawyer resale, with the exception of 50 or 60 shares, as the applications may develop, which I wish you would hold for application upon a sale, a matter which I will go into with you upon my return home, but withhold 60 shares this week, and it can be applied the coming week upon my return.

The letter set forth in count 7 of the indictment, the count upon which Salinger was convicted, was a letter dated October 23, 1919, to Martin Christiansen, Viborg, South Dakota. It appears in the indictment on page 29 and was identified by Christiansen as having been received through the mail at his home, and is introduced in evidence as Exhibit 336. (R. 283, 284, 286.) It is in confirmation of an agreement made by Spellings and Colby (Exhibit 369, R. 283) for the resale of 1,000 shares of stock, to which Christiansen had subscribed, at not less than \$150 per share, all profits to be divided one-half to Christiansen and one-half to Colby and Spellings, and is signed "Midland Packing Company, B. I. Salinger, Vice President and General Counsel." Christiansen, on January 23, 1920, signed another subscription for 1,000 shares of stock at par. (Exhibit 363, R. 281.) This was made in the office of Salinger in Sioux City. He gave a note for \$100,000. At the same time he made an agreement for resale of this stock at \$150, the

profits on the resale to be divided between himself and Colby. "Salinger made out the papers, note, and the contracts." (R. 281.)

Witness Mrs. Bolich, formerly Mrs. Palmer, was employed by Baine and subsequently by Taylor as a stenographer while they were selling Midland stock, and during the Taylor régime practically had charge of the office. She kept books and made necessary reports. She also had authority to sign checks. (R. 167.) She identified Exhibit 222 as a record of stock sales made through the Tom Taylor Company. During the early part of her employment the stock was sold at par and the salesmen turned in to her, with a report of the sale, notes for \$75 a share and the balance in cash or its equivalent, bonds, certificates of deposit, etc. (R. 168.) She entered this in the record book. When stock was sold at \$31.25 a share, her office retained \$31.25 per share as its commission, the balance being turned over to the Packing Company. The report was accompanied by two remittances. One consisted of \$75 per share, the other part of the remittances consisted of cash or its equivalent to the amount of \$18.75 per share. She generally delivered these remittances and reports personally to Mrs. Van Riper, Salinger's secretary, who, she testifies, was generally in charge of that work in the office that Salinger was occupying. Witness identified a number of exhibits, which were reports accompanying remittances made by Taylor to the

Midland Company. (R. 172 et seq.) For instance (R. 172), Exhibit 233, as she testified, had to do with the \$75 per share that went to the Midland Packing Company, while Exhibit 233-A covered the \$18.75 per share on the business covered by Exhibit 233 attached; that is, for each share reported in Exhibit 233 she sent to the office of the Midland Company the sum of \$18.75. The cash accompanying a remittance would usually be a check of Tom G. Taylor & Company. The evidence given by Mrs. Bolich shows the receipt of large amounts of money, notes, etc., by Sawyer & Company, the remission of notes and money from Sawyer & Company to the Midland Packing Company, each remittance being divided into one consisting usually of notes for \$75 per share for the stock and checks of Taylor & Company for \$18.75 per share, representing the amount which the company should receive over and above the \$75 per share on stock sold at \$125 a share.

The witness Nelson, an officer of the First National Bank, Iowa Falls, produced the ledger sheet of the account of the defendant Salinger in that bank covering the period from June 15, 1919, to January 20, 1920; also deposit slips accompanying Salinger's deposits, together with the records of the bank showing its remittances to other banks for collection on items deposited. In this way it was shown that checks and other cash items, which had been sent by Sawyer & Company to the Midland Company in payment of the \$18.75, premiums on

stock sold, were deposited to the credit of Salinger's account. For instance, on July 26, 1919, there was deposited to Salinger's account \$4,537.50. (R. 190.) The notation on the deposit slip showed that it was a check drawn on a Sioux City Bank by T. G. Taylor. The jury evidently believed this to be the same item shown and testified to by Mrs. Bolich. (R. 176, Exhibit 236.) On June 25, 1919, Salinger's account was credited with a deposit of \$2,525. (R. 184.) The deposit slip showed that it was drawn on a bank in Sioux City. (R. 185.) The remittance sheet of the bank showed that an item for that amount, endorsed by Salinger, was sent out for collection. Witness Brown (R. 206), an officer of the Security National Bank of Sioux City, testified that on June 27, 1919, Taylor & Company's account was charged with that item. The jury evidently found this to be the item testified to by Mrs. Bolich (R. 172, Exhibit 233-A) showing a check upon T. G. Taylor & Company for that amount representing \$18.75 per share and remittances made to the Midland Packing Company with a report of stock sold.

On July 2, 1919, Salinger's account was credited with a deposit for \$1,287.50, made up of three items one of which was a check for \$1,137.50. (R. 186, 187.) The bank record shows that the check for \$1,137.50 was drawn on a Sioux City bank. The item was sent to the Cedar Rapids National Bank at Cedar Rapids, Iowa, for collection (R. 187), and

on July 5, 1919, the account of Taylor & Co. in the Security National Bank, Sioux City, was charged with the amount of the check. (R. 207.) The jury evidently found this to be the same item concerning which Mrs. Bolich testified. (R. 173.)

On November 5, 1919, Salinger's account was credited with a deposit of \$1,937.50. (R. 191.) The bank officer said it was an item drawn by T. G. Taylor upon a Sioux City Bank and was remitted to Merchants National Bank of Cedar Rapids for collection. The jury evidently found this to be the same item with respect to which Mrs. Bolich testified (R. 178, 179) as being the amount of a check of Tom G. Taylor & Company.

The cost of promotion and organization of the company, as shown by the books and exclusive of the stock issued to Statter for the plant, was \$2,664,604. (R. 339.) The commissions to Baine were \$407,712.75, and to Taylor \$1,747,517.75, the total \$2,155,230.50. (R. 339.)

The amount disbursed for construction not including the stock issued for the Statter property, was \$2,579,700. (R. 340.)

The total net profit of the company from operations in lard and tallow options and futures was \$8,707.15, and the books showed no other earnings. Interest received was more than offset by interest paid. (R. 342.)

The company began to operate as a packing plant on January 5, 1920, and ceased on the appointment of a receiver May 7, 1920. During this period,

according to the books, the company lost approximately \$200,000. (R. 103, 104.)

Section 4 of Article V of the Articles of Association of the company provided that dividends should be declared and paid only from "the net earnings, accumulated surplus and (or) undivided profits of the corporation." (R. 368, 369.)

At a meeting of the Board of Directors held on December 8, 1919, a resolution was adopted reciting that "guaranteed dividends have been paid to such stockholders as have accumulated upon stock issued for the past several months," and providing for the payment of future dividends beginning July 1, 1920, and payable thereafter quarterly. (R. 366, 367.) The books showed that the company paid dividends beginning in June, 1919, and ending in February, 1920, amounting to \$70,056. (R. 342, 343.)

So far as appears, these dividends were not declared by the directors in accordance with the charter and in accordance with proper corporate management, and were not paid to all stockholders. They were distributed to certain stockholders by the stock salesman.

That there was an oversubscription of stock is shown by the minutes of a meeting of the common stockholders held on March 4, 1920, reciting, "whereas the Board of Directors had authorized an oversubscription of the capital stock of the Midland Packing Company for the purpose of having sufficient stock sold to cover lapses, and to take

care of the financial needs which may develop," it was resolved that the capital stock be increased from \$8,000,000 to \$10,000,000. That was the last meeting held by either the directors or the stockholders before the appointment of the receiver. (R. 368.)

The books showed that during the existence of the company there was issued and subscribed 84,079 shares of the par value of \$100, which would amount to \$8,407,900, not including any of the subscriptions used to take up the Sawyer, Day, Martin, Krebs, and Van Riper subscriptions. (R. 337.)

THE CHARGE TO THE JURY

The trial judge charged the jury at great length (R. 437-465), analyzing the evidence clearly and carefully, and as a whole the charge seems to us to have been rather unfavorable to the Government. At least we can hardly see how it can be regarded in any way as prejudicial to the defendant. At the very beginning he charged (R. 438):

As to each defendant, the fact is to be borne in mind that his guilt or innocence is a personal matter, not to be determined upon any evidence,—not to find him guilty upon any evidence that you do not trace back directly to that particular defendant personally. He is not to be found guilty upon the conduct of others for which he is not directly accountable and responsible.

In this case, as in every other, each defendant is presumed to be innocent. That is

a real presumption, one that abides with him at each stage of the inquiry unless and until the evidence satisfies you beyond a reasonable doubt as to his individual, personal guilt as charged in the indictment.

He made it clear to the jury (R. 440) that the defendants were not on trial "on account of some particular incidental fraud that might have been practiced by some person during the long course of these two or three years of activity," and stated that the charge was (R. 441):

* * * that in this promotion plan, as a whole, from step to step, in its important aspects, in important and substantial phases of it, it was a fraudulent device and contemplated cheating and obtaining money by misrepresentation in its general aspect as part of the promotion enterprise.

After reviewing the Statter deal the court concluded that the defendants had issued only the amount of stock which the officials of the state of Iowa permitted, and that the jury could not hold the defendants under the charge of fraud on account of the acquisition of the property and the issuing of the stock on account of it.

As to the glittering prospects held out regarding the future of the company, its promises of dividends, etc., the court charged the jury that they could not find that the allegations of fraud, based upon the company's expectations, had been sustained. (R. 449.)

With respect to the charge that unearned dividends were paid for the purpose of making people think their money was earning a dividend, the court held that it had not been proved. Though the evidence showed, as the court says (R. 450, 451) that the books only showed profits on margin transactions amounting to about \$8,000, while dividends of upward of \$70,000 were paid, and as the testimony stood and as the books stood, there would be no other inference except that they had been paid, as charged in the indictment; nevertheless, as the witness Stokes, the bookkeeper for the company, testified that there were some dealings out of which profits were run which were not shown upon the books from so-called marginal deals (R. 451), and as the fact that they were not making any profits out of the packing house was "so obvious that everybody knew it," they did not deceive anybody on that, and when they said they had made a profit "what could they have meant and what could anybody understand them to mean except that they had made some kind of deals." So the court concludes:

* * * we would not be justified in finding beyond a reasonable doubt what we would have to find, that they did not pay these dividends and draw them against that profit. (R. 452.)

The court concluded that there remained in the indictment only one other charge of substantial fraud, the making of pretended sales of stock at

par with intent thereafter to raise the price of the stock to 125, take subscriptions at that price, fill them from stock subscribed at par, and converting the proceeds. The charge upon this branch of the case (R. 454 *et seq.*) went into the evidence in detail, the general conclusion being that if the jury found the existence of the scheme, that it was carried out, and that the defendants were shown to have appropriated the proceeds, and, in furtherance of that scheme, used the mails as set forth in the indictment, they could find the defendants guilty. The charge concluded as follows:

* * * The only matter submitted to you upon which you may find a verdict of guilty against the defendants or either of them, is this matter of the premium stock as I have gone over it with you, and as to that matter you should not find either of the defendants guilty unless as to each particular defendant you are satisfied beyond a reasonable doubt that each and every element of the offense has been proven beyond a reasonable doubt. If there is a reasonable doubt, you should acquit, and if there is no doubt in your mind, if you are satisfied that it is proven as charged, then it is your duty to convict. (R. 465.)

At the conclusion of the charge counsel for the defendant made the following request:

I ask the Jury be charged that if there is a failure to prove one part of this indictment, to wit, that the scheme was a device and attempt to defraud, that then all else

becomes immaterial and there must be an acquittal. (R. 465.)

The court replied:

That is an exact statement of the law as I understand it, and you may take that statement of the law as equally binding upon you as though I had announced it in the first place myself. (R. 466.)

The jury found Salinger guilty of causing the letter set forth in the seventh count to be delivered pursuant to the fraudulent scheme.

ARGUMENT

I

THE CONSTITUTIONAL RIGHTS OF THE DEFENDANT WERE
NOT VIOLATED IN THE PROCEEDINGS RESULTING IN
HIS CONVICTION

Most of pages 1 to 45, inclusive, of the brief for plaintiff in error are devoted to a discussion of constitutional objections to the judgment below. This discussion may be summarized under three heads:

1. That the court in effect amended the indictment in disregard of the Fifth Amendment.

2. That the indictment failed to advise the accused of the nature of the accusation against him, in disregard of the Sixth Amendment.

3. The defendant having done nothing in the District of South Dakota to cause a delivery of the letter, it was violative of the Constitution to prosecute in that District.

Taking these claims up in order:

1. The court did not amend the indictment or do anything violative of the rights of the defendant in that respect.

At the conclusion of the trial and after counsel for plaintiff in error had requested it, as his brief admits on page 9, the court charged the jury in substance that the Government had failed to present evidence sufficient to find the defendants guilty with respect to certain of the matters charged in the indictment. There remained, however, the allegation of a fraudulent scheme to procure subscriptions for stock at par; to apply upon them other subscriptions at a premium, and to convert the premium. This was in itself a complete scheme and was in no way dependent upon any of the other elements set forth in the indictment. The scheme to appropriate the premiums was in no way dependent upon the fraudulent issue of stock in connection with the Statter transaction, nor upon false representations made to the "Blue Sky Commissions," nor upon the false representations of stock salesmen in making glittering representations about the prospects of the company. The gist of the offense under Section 215 is the use of the post-office establishment in the execution of the scheme, not the scheme itself. *Mounday v. United States*, 225 Fed. 965, 966. There is nothing unusual or improper in withdrawing from the consideration of the jury, under such circumstances, charges which, in the opinion of the court, have not been sustained

by the evidence. *United States v. Smith*, 222 Fed. 165, 166; *Silkworth v. United States*, 10 F. (2nd) 711, 715 (certiorari denied April 19, 1926). It is a settled rule in criminal law that proof of so much of an indictment as shows that defendant committed a substantive crime, therein set forth, is sufficient. *Egan v. United States*, 287 Fed. 958, 963.

2. A mere reading of the indictment is all that is necessary to show that it adequately advised the defendant of the nature of the accusation against him. The defendants were indicted jointly and the indictment charges that the acts complained of were done by the "defendants." Under such an indictment it is not necessary to show that each defendant participated in doing everything that was done. They were shown to have been engaged in a common enterprise. Each of them did certain things in carrying on that enterprise, and the court very carefully instructed the jury that the guilt of each defendant was a personal matter, and that he could not be found guilty for anything done that could not be traced to him personally. He was not to be found guilty upon the conduct of others for which he was not directly accountable and responsible (R. 438.)

3. Under Section 215 of the Criminal Code a defendant may lawfully be tried in the district in which the letter is delivered, and the point that the defendant did nothing in the District of South Dakota to cause the delivery of the letter there, and

so could not be prosecuted in that district, is not well taken. *Salinger v. Loisel*, 265 U. S. 224. It is argued elaborately that the decision in that case was not determinative of the right of the United States to try Salinger in South Dakota under the indictment. With that we can not agree. This Court pointed out (265 U. S. 232) that an accused could not be tried in one district on an indictment showing that the offense was not committed in that district, and that there was no authority for a removal to a district other than one in which the Constitution permits the trial to be had. The Court then said, page 233:

* * * We proceed therefore to inquire whether it appears, as claimed, that the offense was not committed in the District to which removal is sought.

After quoting the material part of Section 215 of the Criminal Code, and taking up the allegations in the indictment that the defendant did "cause to be delivered by mail," according to the direction thereon, at Viborg, within the Southern Division of the District of South Dakota, a certain letter directed to a named person at that place, and after pointing out that Section 215 is a reenactment, with changes, of an earlier statute, this Court said, at pages 234-235:

* * * Evidently Congress intended to make the statute more effective, and to that end to change it so that, where the letter is delivered according to the direction, such

wrongful use of the mail may be dealt with in the district of the delivery as well as in that of the deposit. * * *

We conclude that there is no sound basis for the claim that the indictment shows that the offense was not committed in the district to which removal is sought. An effort was made to strengthen that claim by producing testimony tending to show that Salinger was not in the district at the time. But of that effort it suffices to say that the nature of the offense is such that he could have committed it, or have participated in its commission, even though he was not then in the district. *In re Palliser*, 136 U. S. 257; *Horner v. United States*, 143 U. S. 207, 213; *Burton v. United States*, 202 U. S. 344, 386.

II

THE PROOF THAT DEFENDANT CAUSED THE LETTER MENTIONED IN COUNT 7 OF THE INDICTMENT TO BE DELIVERED BY MAIL AT VIBORG, SOUTH DAKOTA, WAS COMPLETE

In the brief of the plaintiff in error, page 68, Point XIV, it is claimed that there was a failure to prove that defendant mailed or caused the mailing of the letter exhibited in the count upon which there was a conviction. Salinger's signature to the letter (Exhibit 366) was proved by the witness Thayer, a stenographer employed by the Midland Company, who took dictation from Salinger. (R. 245, 247.) Furthermore, there were other exhibits in evidence, otherwise relevant and bearing Salin-

ger's signature, from which, by comparison, the jury itself could have found that the signature was his. The delivery of the letter at the place of address by mail was proved by Christiansen, the man to whom it was addressed. (R. 283, 284.) The weight of the evidence is not reviewable upon writ of error. *Crumpton v. United States*, 138 U. S. 361, 363; *Johnson v. United States*, 157 U. S. 320.

III

THE JURY WAS JUSTIFIED IN FINDING THAT THE LETTER MENTIONED IN THE SEVENTH COUNT OF THE INDICTMENT WAS IN FURTHERANCE OF THE RESALE SCHEME

It is unnecessary to repeat what has already been said (Ante p. 10, *et seq.*) with respect to the evidence showing the nature of the scheme to resell stock for the purpose of appropriating the premium. Having found that the scheme existed, the jury could hardly have failed to find that the letter was in furtherance of the scheme. It confirmed an arrangement whereby Christiansen had subscribed for stock under an agreement with agents for its resale and for a division of the profits. Furthermore, light was thrown by the subsequent transaction when Christiansen went to Salinger's office and made a similar agreement, Salinger himself drawing the papers. At the time these agreements were made, the price of the stock had been advanced to \$125 a share and the scheme was in full operation. The

jury doubtless found it impossible to discover any honest purpose on the part of an officer of the corporation in assisting a purchaser to procure stock at par in order to resell it at a profit to be divided with an agent.

IV

THERE WAS NO ERROR WITH RESPECT TO EVIDENCE AS TO CHARACTER, EITHER IN EXCLUDING TESTIMONY OR IN THE CHARGE TO THE JURY

Several so-called character witnesses were examined in the proper way; that is, by interrogating them as to the reputation of the defendant. One of the witnesses, however, was asked the direct question:

Based upon your acquaintance with the defendant Salinger, what do you say as to what his character is and has been, whether it has been good for probity and honesty and integrity? (R. 417-18.)

The court excluded the question, saying:

Yes; I take it to be incompetent for anyone to say what a man's character is. The question is what his general reputation is. (R. 418.)

Witness was then allowed to testify that Salinger's reputation was good.

We do not find in the brief for plaintiff in error any authority which justifies the conclusion that the question excluded was admissible. We have always understood the rule to be as stated by the trial court. The testimony considered in *Edging-*

ton v. United States, 164 U. S. 361, was as to defendant's "general reputation for truth and veracity."

Defendant's counsel (R. 466) asked that the jury be charged "as to the weight to be given evidence of good character and good reputation, in connection with the presumption of innocence and the doctrine of reasonable doubt." The court then charged as follows:

It has been proven and established by the evidence, and there is no dispute about it, that the defendant Ben I. Salinger, Jr. was a man whose reputation for truth and veracity and probity was good; it was proven and there is no dispute raised on it that the defendant Fred C. Sawyer is a man whose reputation, general reputation, in the community in which he was living at the time these matters are alleged to have occurred for probity and honesty and integrity was good. It is proven and established that the reputation, the general reputation, of the defendant Burlingame in the Community in which he lived at the time of these matters we are inquiring about, was good.

And those are circumstances which the Jury should take into consideration along with other matters that have been laid before you. (R. 466, 467.)

Counsel for the defendant then said:

I am constrained to except to this instruction as not fully stating what the effect of

the law is as to good character and good reputation for honesty, integrity, in connection with the presumption of innocence, and the creation of reasonable doubt. (R. 467.)

If defendant's counsel had desired more specific instructions to the jury in this respect, he should have made a direct request. Since the decision in the *Edgington case* the question of the weight to be given to the testimony of character witnesses has arisen many times. The charge given seems to have been sufficient, especially in the absence of a request for specific instructions. In *Kreiner v. United States*, 11 F. (2nd) 722 (certiorari denied June 7, 1926, No. 1207) there is a careful review of the authorities. See also *Kaufmann v. United States*, 282 Fed. 776, certiorari denied 260 U. S. 735; *LeMore v. United States*, 253 Fed. 887, certiorari denied 248 U. S. 586.

CONCLUSION

We do not deem it necessary to refer to the many other matters urged as grounds for reversal. These mail fraud cases have been numerous. This Court has considered many of them. They are much alike and the applicable rules of law are well settled and well understood. It is not exaggeration to say that almost everything done on the trial was the subject of almost every conceivable kind of objection. The efforts of the prosecution were met by most persistent and ingenious obstruction. Nevertheless, as was said by the Circuit Court of Appeals

for the Sixth Circuit in *Benham v. United States*, 13 F. (2d) 558, at page 561:

* * * On the whole, this record appears to be unusually free from error of any kind, although it was obviously tried by defendants' counsel with a view to producing a record having reversible error. The trial judge appears to have carefully protected the just rights of the defendants, and his rulings upon questions of evidence and his charge to the jury were not unfavorable to them.

The judgment should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.

ALFRED ADAMS WHEAT,
Special Assistant to the Attorney General.

RANDOLPH S. COLLINS,
Attorney.

OCTOBER, 1926.



SUPREME COURT OF THE UNITED STATES.

No. 238.—OCTOBER TERM, 1926.

Benjamin I. Salinger, Jr., Plaintiff in Error, vs. The United States.	}	In Error to the District Court of the United States for the District of South Dakota.
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[November 23, 1926.]

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

By this direct writ of error we are asked to review a judgment of conviction in the federal district court for South Dakota for a violation of section 215 of the Criminal Code which makes it a criminal offense to use the mail for the purpose of executing a scheme to defraud. The writ was sued out on the assumption that the case is one involving the construction and application of certain provisions of the Constitution relating to accusations and prosecutions for criminal offenses. If the assumption was right the writ was properly allowed under section 238 of the Judicial Code as existing at that time (November 29, 1924); otherwise the review should have been sought in the Circuit Court of Appeals.

The statutes which define and distribute federal appellate jurisdiction and make the existence of a constitutional question the test of the right to a review, as also of the court in which the review may be had, always have been construed as referring to a question having sufficient substance to deserve serious consideration, and not one which is so devoid of merit as to be fanciful or frivolous, or which is not open to discussion because settled by prior decisions. *Goodrich v. Ferris*, 214 U. S. 71, 79, 81; *Brolan v. United States*, 236 U. S. 216; *Sugarman v. United States*, 249 U. S. 182. Under a different construction the restrictions and distributing provisions in the statutes would have little purpose: for constitutional questions of no substance readily could be devised and presented as mere pretexts for obtaining a review on other questions. *United Surety Co. v. American Fruit Co.*, 238 U. S. 140, 142.

This case, being criminal, belongs to a class in which the review ordinarily is to be had in the Circuit Court of Appeals, Judicial

Code, sec. 128. Therefore it becomes material to inquire whether the constitutional questions said to be involved are adequate to bring the case within the exceptional provision in section 238 for a review by this Court on direct writ of error.

The grounds advanced for invoking such a review are:

1. The conviction in the District of South Dakota was in violation of the provision in the Sixth Amendment to the Constitution entitling an accused to a trial in the State and district wherein the crime was committed, because (a) the indictment definitely charged the crime as committed in the Northern District of Iowa; (b) if the indictment did not so charge, it was uncertain in that it did not show whether the place of the crime was in one district or in the other, and (c) there was no evidence that the place was in the District of South Dakota.

2. The charging part of the indictment was so indefinite and ambiguous that the accused was not informed of the nature of the accusation as required by the same Amendment.

3. On the trial hearsay evidence was admitted over the accused's objection that its admission would be in derogation of his right under that Amendment to be confronted with the witnesses against him.

4. Contrary to the Fifth Amendment the accused was held to answer for an infamous crime otherwise than on an indictment by a grand jury, in that on the trial the court, being of opinion that part of what was charged in the indictment had no support in the evidence, withdrew that part from the jury and left them free to convict on what remained without a resubmission to a grand jury.

When these contentions are stated without more some of them appear to present serious constitutional questions, but it is quite otherwise when they are examined in connection with pertinent portions of the record and in the light of prior decisions.

The indictment contained several counts. All related to the same scheme to defraud, but each charged a distinct use of the mail for the purpose of executing the scheme. There were three defendants. Two were acquitted on all counts. Salinger, the other defendant, was convicted on the seventh count and acquitted on the others. His conviction on that count is what we are asked to review, the assignments of error being unusual in number and directed against almost everything done in the case.

The offense charged in that count was that the defendants devised a described scheme to defraud and, for the purpose of executing it, knowingly caused a letter to be delivered by the mail, according to the direction thereon, at Viborg, in the District of South Dakota, the letter and the direction being set forth. Then, by way of explaining how the delivery was brought about the count further charged that the defendants had caused the letter to be placed in the post office at Sioux City, Iowa, for delivery through the mail at Viborg, South Dakota, according to the address thereon.

It is very plain that the offense charged was causing the letter to be delivered by mail in South Dakota in furtherance of the scheme, and that the proper place of trial was in the District of South Dakota, where the delivery was effected as intended. We so held in a proceeding where Salinger was resisting removal to that district for trial on this indictment. *Salinger v. Loisel*, 265 U. S. 224. The question hardly was debatable then, and certainly has not been an open one since. The assertion that there was no evidence of the commission of the offense in that district amounts to no more than saying that the offense charged was not proved, and therefore that a verdict of acquittal should have been directed. But it has no bearing on the district in which the offense charged was to be tried.

Of the contention that the indictment did not conform to the constitutional provision entitling the accused to be informed of the nature of the accusation it suffices to say that after reading the indictment we think the contention is so plainly without any fair basis as to be frivolous.

The evidence which is characterized as hearsay and said to have been received in violation of the accused's right to be confronted with the witnesses against him consisted of letters, bank-deposit slips and book entries. As to many items their admission became of no moment when Salinger was acquitted on all but one of the counts and the other defendants on all. As to some the instructions to the jury prevented their admission from affecting Salinger, for the court said that as to each defendant the question of his guilt or innocence was strictly personal and that he could not be found guilty on evidence that was not traced back to him personally, nor by reason of any conduct of others for which he was not directly accountable and responsible. Of the remaining items some must be put aside as negligible for other reasons. Those deserving men-

tion were received on the theory, not that they were admissible in themselves, but that Salinger's acts and conduct, shown by other evidence, had brought him into such relation to them as to make them admissible in connection with that evidence. To illustrate: Some of the letters, although written by persons not produced as witnesses, were shown to have been laid before Salinger and answered by him; and on this ground they were admitted along with the answers. Evidence equally potent in showing his relation to other material items underlay their admission. Thus the challenged evidence was received, not as having merely a hearsay status, but because proved acts or conduct of Salinger had brought him into such relation to it as to make it more than hearsay as to him.

The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this Court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions. *Mattox v. United States*, 156 U. S. 237, 243; *Robertson v. Baldwin*, 165 U. S. 275, 281-282; *Kirby v. United States*, 174 U. S. 47, 61; *Dowdell v. United States*, 221 U. S. 325, 330. The present contention attributes to the right a much broader scope than it had at common law, and could not be sustained without departing from the construction put on the constitutional provision in the cases just cited.

Plainly the question in respect of confrontation is not of any substance.

The contention that the court, by withdrawing from the jury a part of the charge as without support in the evidence, amended the indictment and thereby prevented it from longer serving as an accusation by a grand jury is on no better plane than the others. The indictment was not amended, either actually or in legal effect. It remained just as it was returned by the grand jury, and the trial was on the charge preferred in it and not on a modified charge. After the evidence was put in, the accused, believing that part of the charge had no support in the evidence, requested that that part be withdrawn from the jury; and the court acceded to the request when the final instructions were given. The scheme to defraud as set forth in the indictment was manifold in that it comprehended several relatively distinct plans for fleecing intended victims. What the court withdrew from the jury was all of these

plans but one. Thus the court ruled that the evidence while tending to sustain the charge as respects one of the plans did not give it any support as respects the others. Whether this was right or wrong—as to which we intimate no opinion—it did not work an amendment of the indictment and was not even remotely an infraction of the constitutional provision that “no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury.” *Goto v. Lane*, 265 U. S. 393; *State v. Evans*, 40 La. Ann. 216, 218. And see *Crain v. United States*, 162 U. S. 625, 636; *Hall v. United States*, 168 U. S. 632, 638-639. In the case of *Ex parte Bain*, 121 U. S. 1, on which the accused relies, there was an actual amendment or alteration of the indictment to avoid an adverse ruling on demurrer, and the trial was on the amended charge without a resubmission to a grand jury. The principle on which the decision proceeded is not broader than the situation to which it was applied.

We are of opinion that the constitutional questions advanced to secure the direct writ of error are all so wanting in substance that they afford no basis for the writ.

As the writ was allowed before the Act of February 13, 1925, c. 229, 43 Stat. 936, the case must be transferred to the Circuit Court of Appeals under the Act of September 14, 1922, c. 305, 42 Stat. 837, which, although repealed by the Act of 1925, is to be applied, under the terms of the saving clause, to proceedings for the review of judgments rendered theretofore.

Transferred to Circuit Court of Appeals.

A true copy.

Test:

Clerk, Supreme Court. U. S.